



Consultation Paper on Arrangements for Filling Vacancies in the Legislative Council

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Chapter One: Addressing the mischief arising from the resignations of five Legislative Council Members in 2010 and reviewing the arrangements for filling vacancies in the Legislative Council

Mischief arising from the resignations of five Legislative Council Members

1.01 On 25 January 2010, five Legislative Council (“LegCo”) Members from the five respective geographical constituencies (“GCs”) gave written notice of resignation to the Clerk to the LegCo in order to force territory-wide by-elections for the purpose of instigating a so-called “referendum”. Their resignations took effect from 29 January 2010. The Electoral Affairs Commission (“EAC”) conducted by-elections on 16 May 2010 to fill the five vacancies in accordance with the Legislative Council Ordinance (Cap. 542) (“LCO”). The five resigned LegCo Members (“Members”) stood in the by-elections and were all re-elected, but the by-elections had a record low voter turnout rate of 17.19%, with around 580,000 electors voting. The by-elections cost around \$126 million. According to opinion polls conducted by various organisations between November 2009 and May 2010, around 50% to 58% of the respondents were against the so-called “referendum”¹.

¹ According to the opinion poll conducted in December 2009 by the Hong Kong Institute of Asia-Pacific Studies, the Chinese University of Hong Kong, 56.7% of the respondents were against or very against the so-called “referendum”. Please refer to the press release at http://www.cpr.cuhk.edu.hk/en/press_detail.php?id=88&s. The Public Opinion Programme (“POP”) of The University of Hong Kong and NOW TV jointly conducted 10 opinion polls between November 2009 and May 2010 under the “Joint Public Research Project on Political Reform”. In the second and the fourth to eighth polls which covered this question, around 50% to 58% of the respondents were opposed to the so-called “referendum”. For details, please refer to the following websites:

- (i) the second poll: <http://hkupop.hku.hk/english/release/release716.html>
- (ii) the fourth poll: <http://hkupop.hku.hk/english/release/release721.html>
- (iii) the fifth poll: <http://hkupop.hku.hk/english/release/release730.html>
- (iv) the sixth poll: <http://hkupop.hku.hk/english/release/release735.html>
- (v) the seventh poll: <http://hkupop.hku.hk/english/release/release744.html>
- (vi) the eighth poll: <http://hkupop.hku.hk/english/release/release752.html>

- 1.02 The incident led to considerable concern in the community. It was considered by many members of the public and different political parties as an unnecessary and significant drain on public resources, which could have been deployed for other more productive purposes. There are calls for the current arrangement for filling a vacancy in the LegCo through a by-election to be reviewed. There is also a large body of public opinion that the loophole should be plugged to prevent occurrence of similar incidents in future.
- 1.03 On the other hand, some (particularly those Members who resigned and stood in the by-elections and their supporters) have expressed the view that there is nothing inappropriate for a Member to be able to resign in order to trigger a by-election in which he or she intends to stand. They take the view that such conduct could be a legitimate way to convey a political message.
- 1.04 The Administration considers that it is an abuse of process for a Member to resign in order to trigger a by-election in which the Member intends to stand and seek re-election. This mischief needs to be addressed. In this regard, the Administration is concerned with the adverse impact such resignations and seeking to be re-elected through by-elections will have on the electoral system and on the public.
- 1.05 Apart from the manpower and financial resources involved, between a Member's resignation and the by-election, the LegCo will be deprived of the service of a Member, and the constituents will be deprived of the service of the Member as their representative. Moreover, if the phenomenon of a Member resigning in order to trigger a by-election in which he or she seeks to stand becomes a common occurrence (and there have in fact been threats by some to repeat the resignation and by-election exercise), not only will the operation of the LegCo be adversely affected, the integrity of the Legislature will also be undermined and respect for the electoral process lowered.
- 1.06 In the past one and a half years, various proposals for plugging this loophole have been put forward and discussed in the community. Some Members suggested restricting a Member who resigns from standing in any by-election during the remainder of the LegCo term. A Member has even proposed to put forth a Member's bill to do so.

Arrangement for filling vacancies in the Legislative Council

Voting system for GCs in Hong Kong

- 1.07 The LegCo election in Hong Kong has adopted the list proportional representation system² for the GC general elections since 1998. The intention of the existing system, whereby single votes cast by electors can return multiple seats in a GC, is to secure a close match between the percentage of votes that a group of candidates obtains in an election and the number of seats that such a group can fill. In addition, under this system, parties and groups winning a small percentage of the votes may still be able to secure seats which they would not be able to secure under the first-past-the-post system³.
- 1.08 While the list proportional representation system is adopted for a GC general election, the system does not apply to a by-election for filling one single vacancy. Currently, a by-election is held when a vacancy in the LegCo membership arises mid-term under the situations as stipulated in section 15 or 72 of the LCO or Article 79 of the Basic Law (see paragraphs 2.02 to 2.04). In a GC, this results in a by-election for a single seat, which in effect is filled through the first-past-the-post system. This was the case in the 2000 and the 2007 LegCo Hong Kong Island by-elections and the 2010 LegCo GC by-elections.
- 1.09 When the office of a Member is vacated and a by-election is held to fill the vacancy, the seat would most likely be filled by a candidate from one of the major parties or a candidate supported by them. Candidates from small parties would not stand much chance as otherwise exists in the proportional representation

² Under the system, an elector is entitled to cast a single vote for a list of candidates and not for an individual candidate. The number of valid votes cast will be divided by the number of seats to be filled for that GC to arrive at the quota of votes. Each list that attains the quota will have one candidate on the list elected. When not all the seats are filled by applying the quota, then the filling of the remaining seat(s) will be decided by the largest remainder of valid votes cast for each list after the deduction of the quota.

³ According to the first-past-the-post system, the candidate who obtains the greatest number of votes will be elected.

system that is used in the general election. To conduct a by-election therefore introduces a first-past-the-post element into what is otherwise a proportional representation system for electing Members for the constituencies. This changes the nature of the election for the seats initially allocated under the proportional representation system.

- 1.10 Views have been expressed that under the multi-member proportional representation system, filling casual vacancies by holding by-elections is generally considered unfair because the vacating member was elected to represent a proportion of the electorate, not a majority of the electorate. Holding a by-election for one vacancy, where the majority would choose the vacating member's replacement, could result in an unfair shift in the political balance in the legislature⁴. Besides, it is considered that an advantage of the list proportional representation system is that there is no need to hold by-elections, while a disadvantage of the first-past-the-post system is the need for frequent by-elections⁵.

District Council (second) Functional Constituency

- 1.11 Following the enactment of the Legislative Council (Amendment) Ordinance 2011 (No. 2 of 2011), five new District Council (second) Functional Constituency ("DC (second) FC") seats will be returned from the whole Hong Kong Special Administrative Region ("HKSAR") as a single constituency for the LegCo in accordance with the list proportional representation system commencing from its fifth-term in 2012. Candidates will be elected by all registered GC electors other than those who are entitled and have opted to vote in the other functional constituencies ("FCs"). It means that the five DC (second) FC seats will be returned by approximately 3.2 million registered electors. The resignation of just one single Member from the new DC (second) FC will trigger a territory-wide by-election, involving more than 520 polling stations with costs expected to exceed \$100 million. This would aggravate the prejudicial effects of the mischief discussed in paragraphs 1.02, 1.04 and 1.05 above.

⁴ For details, please refer to the website of the Electoral Council of Australia, http://www.eca.gov.au/systems/proportional/proportion_rep.htm.

⁵ Page 119 of "Electoral System Design: The New International IDEA Handbook" published by the International Institute for Democracy and Electoral Assistance (IDEA) in 2005.

Electoral systems and arrangements for filling mid-term vacancies in other jurisdictions

- 1.12 It is against the above background that the Administration has undertaken a review on the subject with a view to identifying a suitable alternative arrangement to return a candidate to take up a vacant seat. In so doing, the Administration has also considered the replacement method against the voting system for the GC elections in Hong Kong, and the practices in some overseas jurisdictions.
- 1.13 The Administration notes that different jurisdictions are entitled to develop their own electoral systems in different ways to reflect the differences in their own historical background, culture and political development. There are different electoral systems in the world, and the main families being plurality systems (including the first-past-the-post system), proportional representation systems (including the list proportional representation system and the single transferable vote system). Some adopt mixed systems in which some seats are returned by the first-past-the-post system and some by the proportional representation system. The first-past-the-post system is found primarily in the United Kingdom and jurisdictions under her influence, such as Canada and India. Proportional representation systems are a common choice in many new democracies and are dominant in Africa, Europe and Latin America⁶.
- 1.14 In a number of jurisdictions adopting the first-past-the-post system in general elections, such as Canada, India and the United Kingdom, in general, a by-election is held in the event that a mid-term vacancy arises.
- 1.15 In jurisdictions where some or all of the seats are returned using a proportional representation system in general elections, there is no uniform arrangement on how a mid-term vacancy in such seats is to be filled. Some examples are set out below:

⁶ Pages 35 and 57 of “Electoral System Design: The New International IDEA Handbook” published by the International Institute for Democracy and Electoral Assistance (IDEA) in 2005.

- (a) where a list proportional representation system is adopted in general elections, a replacement mechanism will be used if there is a mid-term vacancy. In general, a mid-term vacancy will be filled by a candidate who has not been elected and who is from the same list as that of the vacating member. Examples include Austria, Belgium, the Czech Republic, Denmark, Finland, Germany, Hungary, Japan, Lithuania, New Zealand, Poland, the Slovak Republic, Slovenia and Switzerland; and
- (b) where the single transferable vote system is adopted in general elections, a mid-term vacancy is filled by -
 - (i) recounting the ballot papers that were received by the vacating member to determine which candidate was the next most favoured candidate chosen by the voters who elected the vacating member. Examples include the Australian Capital Territory and Tasmania; or
 - (ii) a by-election will be held to fill a mid-term vacancy. Ireland is an example.

1.16 Of note is that in Lithuania, a vacancy in the seats returned by the list proportional representation system is filled by candidates on the list of the vacating member. If the list is exhausted, the list with the largest remaining votes will be used to fill the vacancy. In Finland, a vacancy will first be filled by candidates on the list of the vacating member. If the list is exhausted, the first candidate who has not been elected in the master name list of all candidates will fill the vacancy. In the Czech Republic, Germany, New Zealand and Poland, the seat is left vacant if the same list is exhausted.

1.17 A note on the arrangements for filling mid-term vacancies in the abovementioned jurisdictions is at [Annex I](#).

The Administration's legislative proposal

1.18 After careful consideration, the Administration announced a proposal on the arrangements for filling vacancies in the GCs and the future DC (second) FC on 17 May 2011. The LegCo Panel on

Constitutional Affairs was consulted on 24 May 2011 and a majority of Members agreed that the existing loophole had to be plugged. On 3 June 2011, the Legislative Council (Amendment) Bill 2011 (“the Bill”) was gazetted. The Bill proposed a replacement mechanism to fill a casual vacancy in any GC or the DC (second) FC in all situations. This ensures that the will of the electorate is preserved for the four-year term of the LegCo.

- 1.19 The replacement mechanism does not apply to casual vacancies in the existing 28 traditional FCs⁷, because they do not adopt the list proportional representation system.
- 1.20 A Bills Committee (“the Bills Committee”) was formed on 10 June 2011 and seven meetings were held to scrutinise the Bill. A special meeting of the LegCo Panel on Constitutional Affairs was held on 18 June 2011 to receive views from 116 organisations and individuals (in the event 88 turned up) on the Bill. Taking into account the views of the Bills Committee and the general public, the Administration put forward a revised replacement mechanism on 28 June 2011.
- 1.21 In response to the views of the Bills Committee that the Administration should provide more time to consider Members’ suggestions and listen further to the views of the public, the Constitutional and Mainland Affairs Bureau has prepared this Consultation Paper for conducting a two-month public consultation to collect views from the public.

⁷ The existing 28 traditional FCs are single seat constituencies except for the labour FC which comprises three seats. For the four FCs with small electorates (i.e. the Heung Yee Kuk FC, the agriculture and fisheries FC, the insurance FC and the transport FC), the preferential elimination system of voting is adopted. For the remaining 24 FCs, the first-past-the-post system is adopted.

Chapter Two: Major legal provisions governing the filling of casual vacancies in the Legislative Council

- 2.01 Article 26 of the Basic Law provides that permanent residents of the HKSAR shall have the right to vote and the right to stand for election in accordance with law. Article 21 of the Hong Kong Bill of Rights (“HKBOR”) provides that every permanent resident shall have the right and the opportunity, without unreasonable restrictions, to vote and to be elected at genuine periodic elections. Article 68 of the Basic Law stipulates that the LegCo shall be constituted by election. The specific method for forming the LegCo is prescribed in Annex II to the Basic Law. Annex II stipulates, among other things, that the voting method for direct elections in GCs and the election methods for FCs shall be specified by an electoral law introduced by the Government of the HKSAR and passed by the LegCo. Article 69 of the Basic Law provides that the term of office of the LegCo shall be four years, except for the first term which shall be two years.
- 2.02 While the Basic Law does not provide for the resignation of Members, Article 79 provides that the LegCo President shall declare that a Member is no longer qualified for the office under any of the following circumstances:
- (a) when he or she loses the ability to discharge his or her duties as a result of serious illness or other reasons;
 - (b) when he or she, with no valid reason, is absent from meetings for three consecutive months without the consent of the President of the LegCo;
 - (c) when he or she loses or renounces his or her status as a permanent resident of the HKSAR;
 - (d) when he or she accepts a government appointment and becomes a public servant;
 - (e) when he or she is bankrupt or fails to comply with a court order to repay debts;

- (f) when he or she is convicted and sentenced to imprisonment for one month or more for a criminal offence committed within or outside the HKSAR and is relieved of his or her duties by a motion passed by two-thirds of the LegCo Members present; and
- (g) when he or she is censured for misbehaviour or breach of oath by a vote of two-thirds of the LegCo Members present.

2.03 The LCO provides for the constitution, convening and dissolution of the LegCo, the election of Members, and other related matters. Under section 14 of the LCO, a Member may, at any time, resign from office as a Member by giving written notice of resignation to the Clerk to the LegCo. Section 15 of the LCO stipulates that a Member's office becomes vacant if the Member:

- (a) resigns;
- (b) dies;
- (c) alters either the Member's nationality or the fact as to whether the Member has a right of abode in a country other than the People's Republic of China ("PRC")⁸;
- (d) is the President of the LegCo and has been found under the Mental Health Ordinance (Cap. 136) to be incapable, by reason of mental incapacity, of managing and administering his or her property and affairs; or
- (e) is declared in accordance with Article 79 of the Basic Law to be no longer qualified to hold that office.

⁸ This does not apply to a Member elected for the legal FC, the accountancy FC, the engineering FC, the architectural, surveying and planning FC, the real estate and construction FC, the tourism FC, the commercial (first) FC, the industrial (first) FC, the finance FC, the financial services FC, the import and export FC and the insurance FC unless the Member declared in the nomination form that he or she has Chinese nationality or has no right of abode in a country other than the PRC and subsequently he or she:

- (a) acquires a nationality other than Chinese nationality, or
- (b) acquires a right of abode in a country other than the PRC.

- 2.04 Section 72 of the LCO provides that if, on the hearing of an election petition, the Court of First Instance (“CFI”) determines that a person who was originally declared as a Member was not duly elected and does not make any determination that another person was duly elected as a Member in place of that person, subject to the expiry of the appeal period for lodging an appeal to the Court of Final Appeal (“CFA”) and that the Member does not lodge an appeal to the CFA, that person’s office as a Member becomes vacant from the date on which the written judgment of the CFI is handed down. It is further provided that if, on the hearing of an appeal against the determination of the CFI of an election petition, the CFA determines that a person who was originally declared as a Member was not duly elected and does not determine that another person was duly elected in place of that person, that person’s office as a Member becomes vacant from the date on which the written judgment of the CFA is handed down.
- 2.05 Pursuant to sections 35 and 36 of the LCO, the Clerk to the LegCo must, by notice published in the Gazette, declare the existence of a vacancy within 21 days after becoming aware of the vacancy. The EAC must arrange for a by-election to be held on the making of a declaration as to the existence of a vacancy. Section 16 of the LCO provides that a person who ceases to be a Member is, subject to the disqualification provisions in section 39, eligible for re-election as a Member. There is no provision disqualifying a person who resigns from office as a Member from being nominated or elected as a Member in the resulting by-election or subsequent elections/by-elections.

Chapter Three: Must a causal vacancy in the Legislative Council be filled by means of the holding of by-election?

- 3.01 The following principles are relevant in reviewing the arrangements for filling a vacancy in the LegCo arising mid-term.
- 3.02 The Basic Law does not require that any causal vacancy of the Legislature must be filled by means of a by-election. By-election is not the only lawful means to fill a casual vacancy, and using a replacement mechanism would not amount to an unconstitutional deprivation of the right to vote or the right to stand for election merely because no by-election would be held to fill a causal vacancy. The HKBOR does not contain a requirement relating to by-election either. Furthermore, while the rights under Article 26 of the Basic Law are fundamental rights, they are not absolute and can be subject to reasonable and justifiable restrictions. The same applies to Article 21 of the HKBOR.
- 3.03 Since by-election is not mandatory under the Basic Law, options other than holding a by-election to fill a casual vacancy may be considered and adopted by the Legislature provided they are fair and reasonable, and pursue legitimate aims.
- 3.04 In designing the electoral system, the HKSAR Government and the Legislature enjoy a wide margin of appreciation in managing its electoral affairs⁹. Furthermore, Article 68 of, and Annex II to, the Basic Law give the LegCo a broad discretion in determining the contents of the legislation which governs the “specific method” for forming the LegCo.
- 3.05 It is legitimate for the HKSAR Government and the Legislature to seek changes in the electoral process to resolve or deal with problems arising, including problems arising from resignations triggering by-elections in which the resigning Members seek to

⁹ The concept of margin of appreciation is well established in our courts. It has been applied by the courts in relation to the views of the Legislature – see the Court of Final Appeal judgment in *Mok Charles Peter v Tam Wai Ho*, FACV 8/2010 (13 December 2010), a case concerning electoral matters, per Ma CJ.

stand, and to seek an alternative arrangement in order to address the perceived problems arising (as discussed in paragraphs 1.02, 1.04 and 1.05 above).

3.06 In reviewing the arrangements for filling a mid-term vacancy, it is also legitimate and permissible to consider ways to improve the current system and to avoid the shortcomings of holding by-elections even in situations where a vacancy arises without an “abuse of process” concern. These possible shortcomings include the following:

- (a) holding a by-election would mean the “*de facto*” adoption of the first-past-the-post system, which is at odds with the list proportional representation system used in the general election. As such, a replacement mechanism can also engage merits that are inherent in the use of mechanisms other than by-election to fill a casual vacancy in a GC or the future DC (second) FC which adopts the list proportional representation system;
- (b) the LegCo will be deprived of the service of a Member and the constituents a representative in the LegCo during the period between the Member’s resignation and the by-election; and
- (c) holding by-elections will involve significant costs to public funds.

3.07 An alternative replacement arrangement in lieu of by-election based on the results of the previous general election could still give effect to the free expression of the will of the electors in the general election as a whole. The LegCo would still be “constituted by election” under Article 68 of the Basic Law.

Chapter Four: Options to fill a casual vacancy arising mid-term in the Legislative Council Geographical Constituencies and District Council (second) Functional Constituency

- 4.01 Since the resignations of the five Members in January 2010, quite a few options for addressing the mischief have been put forth and discussed. In 2010, a Member's bill was put forth. Discussions have also intensified since the Administration introduced its proposals in mid-May this year.
- 4.02 In reviewing the electoral process with a view to identifying an appropriate mechanism to address the mischief and to plug the loophole, the Administration has taken the following into consideration:
- (a) whether it is compatible with the Basic Law and the HKBOR and legally justifiable;
 - (b) whether it is a fair and reasonable alternative to by-elections in filling casual vacancies, and whether it can give effect to the free expression of the will of the electors;
 - (c) whether it can effectively address the perceived mischief and plug the loophole; and
 - (d) whether it is consistent with the electoral system in Hong Kong.

Whether to maintain the status quo

- 4.03 In this process, the Administration has considered whether the status quo should be maintained i.e. no legislative amendment will be made, a by-election will be held if a Member resigns, the resigning Member can stand in the resulting by-election, and a considerable amount of public funds will be spent. If the status quo is maintained, the procedures for declaring vacancy and arranging a by-election, as explained in paragraph 2.05, will continue.

- 4.04 Maintaining the status quo has the following implications. No legislative amendment is required. The existing arrangements of declaring a vacancy and holding a by-election will continue. Any controversy over the right to vote and to stand for election will not arise.
- 4.05 However, as Members could continue to resign at will and trigger by-elections in which they seek to stand, the loophole remains unaddressed, and the problems identified in paragraphs 1.02, 1.04 and 1.05 remain. As explained in paragraph 1.11, the problem and the adverse effects would intensify in the new DC (second) FC. Since a by-election (which adopts the first-past-the-post system) will continue to be held to fill a mid-term vacancy in GCs and DC (second) FC (which adopts the list proportional representation system in general elections), it may result in an unfair change in the proportion of seats allocated among political parties and groups in the previous general election (see paragraphs 1.09 and 1.10).
- 4.06 Having regard to the mischief arising from the resignations of the five LegCo Members in 2010 as explained in paragraphs 1.02, 1.04 and 1.05 above, the Administration considers it necessary to plug the loophole. The Administration has, therefore, identified four main options to fill a casual vacancy arising mid-term in GCs and the DC (second) FC. These are discussed in the ensuing paragraphs.

Option 1: restricting resigning Members from participating in any by-election in the same term

- 4.07 There are suggestions that the LCO be amended to restrict a Member who resigns from office from being nominated as a candidate in a by-election for the remainder of the term¹⁰.

¹⁰ A Member proposed to put forth a Member's bill to restrict a Member who resigns from standing in by-elections during the remainder of the LegCo term. As the Member's bill related to public expenditure or political structure or the operation of the Government, the bill was eventually not introduced.

4.08 The following are some possible pros and cons of this Option:

Pros

- (a) this appears to be a more focused approach to address the mischief caused by Members resigning at will in order to trigger by-elections, as the only persons affected are the resigning Members;
- (b) this involves fewer changes to the existing system although the right of the Member concerned to stand in election is restricted;

Cons

- (c) Article 26 of the Basic Law stipulates that permanent residents of the HKSAR shall have the right to stand for election in accordance with law. We have to consider carefully whether such an option is a proportionate response to addressing the mischief of Members resigning at will. The issues to be considered include -
 - (i) whether the resigning Member should be restricted from standing in by-elections for the entire remainder of the term;
 - (ii) what would be the appropriate period of exclusion; and
 - (iii) whether exceptions should be allowed, and if so, under what circumstances.

These issues can be controversial and can give rise to court challenges; and

- (d) while this Option may restrict resigning Members from standing in the resulting by-election, it appears that the mischief identified in paragraphs 1.02, 1.04 and 1.05 above cannot be effectively addressed. Some Members may continue to resign at will to trigger by-elections. Even if they cannot stand in the by-election themselves, other members of their political parties, or people who share their political views, can still stand in the by-election. There will

continue to be by-elections. Moreover, if the restriction from standing in the by-election is imposed only for a limited period, and if there were a repeat of the resignations plus by-elections, those Members who resigned previously might stand in the latter by-elections.

Option 2: a replacement mechanism using the same candidate list followed by a precedence list system (the Administration's revised proposal)

- 4.09 The Administration has proposed a replacement mechanism covering all situations giving rise to a vacancy in any GC or the DC (second) FC, through the introduction of the Bill. The proposed replacement mechanism will not only cover vacancies arising from resignations, but also other situations specified under sections 15 and 72 of the LCO¹¹ and Article 79 of the Basic Law¹². The main considerations are that when a vacancy arises, the reference to the result of the preceding general election will indicate the preference of the electorate as a whole for the most suitable replacement. This will also avoid the holding of by-elections under these situations.
- 4.10 After considering the views of the Bills Committee, the Administration has revised its proposal. The revised proposed is described in the paper for the Bills Committee issued on 28 June 2011 (LC Paper No. CB(2)2226/10-11(01)) at Annex II. The revised proposal and the proposed Committee Stage Amendments (CSAs) to effect the revised proposal were discussed by the Bills Committee on 4 July 2011.
- 4.11 Under the revised proposal, the vacancy concerned will first be filled by the first candidate who has not been elected on the same list as that of the vacating Member. If that candidate is ineligible or unwilling to fill the seat, the vacancy will be filled by the next candidate on the same list, and so on (i.e. the same list arrangement). When there is no more candidate on the same list who is eligible and willing to fill the vacancy, the vacancy will be filled by reference to the precedence list, i.e. the list of the first

¹¹ Please refer to paragraphs 2.03 and 2.04 for sections 15 and 72 of the LCO respectively.

¹² Please refer to paragraph 2.02 for Article 79 of the Basic Law.

candidates who have not been elected on each of the lists with remaining votes at the previous general election, ranked in descending order according to the number of remaining votes of their respective lists (i.e. the fallback arrangement). Finally, if the vacancy cannot be filled by the above methods, a by-election will be held. An illustration of this Option is at Annex III.

4.12 Relevant provisions of the LCO as amended by the Bill and the proposed CSAs (if enacted) are at Annex IV.

4.13 The Administration considers the pros and cons of this Option to include the following:

Pros

- (a) under this Option, to a very large extent the mischief of Members resigning to trigger by-elections in which they seek to stand can be addressed, and the problems identified in paragraphs 1.02, 1.04 and 1.05 avoided¹³;
- (b) inclusion of the precedence list as a fallback arrangement in case the vacating Member's candidate list is exhausted removes the incentive for a Member to resign and for candidates on the same list to refuse to fill a vacancy in order to trigger a by-election;
- (c) even in cases other than an "abuse of process", the replacement mechanism may have merits in avoiding the shortcomings of holding a by-election to fill mid-term vacancies as described in paragraph 3.06 above;
- (d) by allowing a vacancy to be filled primarily by a candidate from the same list as the vacating Member's, this Option gives effect to the will of the electors voting for that Member's list. This is consistent with the list proportional representation system and maintains the proportion of seats allocated among different political parties and groups represented by the lists of candidates in the previous general

¹³ Some Members welcome the Administration's move to put forward the proposed replacement mechanism which can prevent the existing system from being abused in the future. For details, please refer to the Report of the Bills Committee at <http://www.legco.gov.hk/yr10-11/english/hc/papers/hccb2-2285-e.pdf>.

election. For voters concerned, they will know clearly that in the general election, their support for a particular list of candidates representing a particular political party or grouping can be retained throughout the four-year term;

Cons

- (e) if no candidate on the vacating Member's list is eligible or all the candidates on the list are not willing to fill the vacancy, the vacancy will be filled by using the precedence list. Some have concerns about the precedence list arrangement (i.e. the fallback arrangement) because:
 - (i) this fallback arrangement does not give effect to the will of the electors who voted for the vacating Member's list and may distort the effect of the elector's original vote¹⁴. Some are concerned that the use of the precedence list could lead to unreasonable and even "absurd" situations in certain circumstances, e.g. where the vacancy is filled by a candidate from another list which has obtained only a small number of votes¹⁵;
 - (ii) the fallback arrangement would be triggered where the vacating Member's list fails to provide a backup candidate¹⁶, or where a vacancy arises from a Member on a one-candidate list departing, since there will be no other candidate left on his or her list;

¹⁴ Some Members considered that it is difficult for the electors at the time of voting at a general election to know how to vote for the replacement candidates. For details, please refer to the Report of the Bills Committee at <http://www.legco.gov.hk/yr10-11/english/hc/papers/hccb2-2285-e.pdf>. The Law Society of Hong Kong also expressed the view that the proposed mechanism cannot guarantee the free expression of the will of the electors as the right to vote is more than merely the selection of a candidate based on an earlier vote. For details, please refer to http://www.hklawsoc.org.hk/pub_e/news/submissions/20110630b.pdf.

¹⁵ The Hong Kong Bar Association expressed that the Administration's proposal "cannot be said in anyway to reflect the percentage of votes earned by the respective lists at the time when voters exercise their right to vote during the election." Please refer to the Hong Kong Bar Association's statement dated 25 June 2011 at <http://www.hkba.org/whatsnew/press-release/20110625.pdf>.

¹⁶ For details, please refer to the Hong Kong Bar Association's statement dated 29 June 2011 at <http://www.hkba.org/whatsnew/press-release/20110629.pdf>.

- (f) the proposal applies to all mid-term vacancies arising from GCs and the DC (second) FC, and is not confined to situations of voluntary resignation¹⁷; and
- (g) if all the candidates on the same list and all those on the precedence list are ineligible or unwilling to fill the vacancy, a by-election will be held as a last resort. The inconsistency of the results of a by-election held under the first-past-the post system with the list proportional representation system adopted for the general election will remain.

4.14 The Administration considers that the revised proposal can provide a fair and reasonable means to fill a casual vacancy in a constituency for which the list proportional representation system has been adopted. This Option, taken as a whole, represents a reasonable, proportionate and workable rule of certainty because:

- (a) examples of the same candidate list being used to fill casual vacancies can be found in other jurisdictions which adopt the list proportional representation system to return some or all of the seats in general elections;
- (b) while concerns have been raised particularly with respect to the use of the precedence list, such use is only a fallback arrangement. It is envisaged that in practice, most vacancies arising normally could be filled using the same candidate list. The precedence list will only be used rarely, where the same candidate list has been exhausted, i.e. after the will of the electors who voted for the same candidate list has been fully given effect to. If the exhaustion of the candidates on the same candidate list is the result of their collective decision to refuse to fill the vacancy, then this would involve the very mischief which the current legislative exercise seeks to address;

¹⁷ The Hong Kong Bar Association's statement dated 29 June 2011, paragraph 3. Some Members also have reservations about the scope of the proposed replacement mechanism being too wide to cover all situations where a vacancy arises mid-term. For details, please refer to the Report of the Bills Committee at <http://www.legco.gov.hk/yr10-11/english/hc/papers/hccb2-2285-e.pdf>.

- (c) having a fallback arrangement is a crucial element of this proposal in effectively preventing resignations at will triggering by-elections;
- (d) as for an independent Member, it would have been the Member's own choice to stand for election as an independent candidate and not jointly with other candidates. With the Member vacating his or her seat, the effect of the votes cast in his or her favour would have been exhausted and cannot be transferred to others. There is no question of any other candidate on the list of that Member being "deprived" of the value of their votes;
- (e) the precedence list arrangement, which is transparent and objective, uses the results of the previous general election to fill a vacancy, and can therefore give effect to the will of electors at the previous general election *as a whole*¹⁸; and
- (f) the principle of filling a casual vacancy by reference to other lists after exhausting the same list has been established overseas. These include filling the vacancy with reference to the remainder votes of other lists, or by candidates on other lists with reference to the number of votes obtained by those lists in the previous general election (see paragraph 1.16).

4.15 For details of the Administration's views on the legal aspects of the revised proposal, please refer to the paper for the Bills Committee on 4 July 2011 (LC Paper No. CB(2)2299/10-11(01)) at Annex V.

Option 3: a replacement mechanism which does not cover causal vacancies arising from death, serious illness or other involuntary circumstances

4.16 There have been views that a vacancy arising from a Member's death, serious illness or other involuntary circumstances should be differentiated from a vacancy arising from a Member resigning

¹⁸ During the discussions at the Bills Committee, some Members asked, in filling the vacancy, whether all the candidates who had not been elected on the list with the largest number of remaining votes should be exhausted before moving onto the list with the second largest number of remaining votes, and so on.

from office on his or her own initiative, as such a seat would not be left vacant because of a Member's own will¹⁹. Some consider that involuntary situations giving rise to a vacancy such as death and serious illness of Members should not be regarded as a mischief that needs to be addressed. It has, therefore, been suggested that the replacement mechanism should not cover vacancies arising from death, serious illness or other involuntary circumstances. Such vacancies should continue to be filled by holding by-elections²⁰.

4.17 The following are some possible pros and cons of this Option:

Pros

- (a) applying the replacement arrangement to more restrictive circumstances may be a more proportionate response to the public concern in question; and

Cons

- (b) there will be two different arrangements for filling a vacancy. In cases of death, serious illness and perhaps other circumstances outside the control of a Member, by-elections adopting the first-past-the-post system will be held. In resignations (and other circumstances) within the control of Members, a replacement mechanism that is consistent with the list proportional representation system will apply. Under such a dual-track approach, the result of the general election under the list proportional representation system will only be preserved in a limited fashion. By-elections under the first-past-the-post arrangement will apply in the other

¹⁹ There are different suggestions on the circumstances that should be taken out as involuntary situations giving rise to vacancies and by-elections should be held for these situations:

- (i) death and serious illness of Members; or
- (ii) death and serious illness of Members, as well as imprisonment of Members for a criminal offence committed within or outside the HKSAR; or
- (iii) situations other than Members resigning (under section 15(1)(a) of the LCO).

²⁰ Some Members pointed out that some situations as set out in section 15 of the LCO and Article 79 of the Basic Law are outside the control of the Member, and the scope of the replacement mechanism should exclude those situations. For details, please refer to the Report of the Bills Committee at <http://www.legco.gov.hk/yr10-11/english/hc/papers/hccb2-2285-e.pdf>.

circumstances. Whether such a non-uniform approach is appropriate needs to be considered. There is arguably an inherent inconsistency in this Option.

4.18 Moreover, since there will be two different arrangements for filling a vacancy depending on how the vacancy arises, it is necessary to consider carefully where the dividing line can reasonably be drawn. All the circumstances giving rise to a vacancy under section 15 of the LCO (read together with Article 79 of the Basic Law) should be considered. For example, under section 15 of the LCO, “serious illness” is not in itself a separate ground giving rise to a vacancy. On the other hand, under Article 79 of the Basic Law, a Member ceases to qualify for the office when he or she “loses the ability to discharge his or her duties as a result of serious illness or other reasons”. In other words, if we take an approach of narrowing the scope of the replacement mechanism in Option 2 above, we need to consider:

- (a) whether the replacement mechanism should apply in the different situations where a Member is disqualified under Article 79 of the Basic Law; and
- (b) whether the replacement mechanism should only apply to cases of resignation.

Option 4: a replacement mechanism using the same candidate list, followed by leaving the seat vacant when the list is exhausted

4.19 Some have pointed out the practice in Germany and Poland whereby a vacancy can first be filled by a candidate from the same candidate list as that of the vacating Member (as in Option 2), and if there is no more candidate on the same list who is eligible and willing to fill the vacancy, then the seat can be left vacant for the rest of the term²¹. An illustration of this Option is at Annex VI.

²¹ Some academics and commentators have expressed the view that it would not be logical for a candidate from another list who has not been elected to fill the vacancy. They have pointed out that, in some overseas jurisdictions, if there is no more candidate on the same list who is eligible and willing to fill the vacancy, the seat will be left vacant. Various newspaper articles have referred to this view.

4.20 The following are some possible pros and cons of this Option:

Pros

- (a) same as Option 2;
- (b) in addition, since there will be no fallback arrangement and the seat is simply left vacant, any concerns about the fallback arrangement in Option 2 can be avoided;

Cons

- (c) the desirability of leaving a LegCo seat vacant needs to be considered in light of Hong Kong's legislature where the number of seats is relatively small and there is a 50% to 50% balance between GC and FC seats, especially where a vacancy arises in the early part of a LegCo term; and
- (d) the legal implications of leaving a LegCo seat vacant also have to be explored further.

4.21 On details of the discussions on the options to plug the loophole in the Bills Committee, please refer to the Report of the Bills Committee (LC Paper No. CB(2)2285/10-11) at <http://www.legco.gov.hk/yr10-11/english/hc/papers/hccb2-2285-e.pdf>.

Chapter Five: Concluding remarks and views sought

Concluding remarks

- 5.01 The incident of five Members resigning to stand in by-elections in 2010 has revealed a loophole in the current system whereby Members can resign at will to trigger by-elections in which they seek to stand and be re-elected. The Administration needs to consider what is the most effective and reasonable way to address the problems arising. Maintaining the status quo will leave open room for such resignations and unnecessary by-elections.
- 5.02 There is also a sizable body of opinion in the community and in the LegCo that measures should be devised to plug the loophole. The measures proposed include putting in place a replacement mechanism by referring to the election result in the previous general election. One possibility is to adopt a replacement mechanism using the same candidate list (or other lists with remaining votes) in the previous general election. There are other proposals that would restrict the right of the resigning Members to stand in by-elections for a certain period or even to leave a vacancy unfilled during the remainder of the LegCo term.
- 5.03 On the other hand, some take the view that it is appropriate for Members to be able to resign and then stand in the resulting by-elections, as this could be an effective way to convey political messages. There may also be other reasons as to why a Member decides to resign. The electorate can be left to decide whether or not to continue to support such candidates in the by-elections.
- 5.04 The Administration considers that the Bill, and the proposed amendments to it, provide a fair and reasonable mechanism for filling casual vacancies arising in GCs and the DC (second) FC. However, a final decision will only be taken after this consultation and a thorough consideration of all the responses collected. The Administration would welcome views from members of the public as well as other feasible alternatives.

5.05 After the consultation exercise, the Administration will consolidate views received and publish a report detailing the views received. The Administration intends thereafter to resume and complete the legislative exercise in the 2011-12 legislative session.

Views sought

5.06 In the meantime, the Administration would welcome views on the following questions:

- (a) whether the phenomenon of Members resigning at will, triggering by-elections in which they seek to stand and involving a considerable amount of public funds, is a loophole that needs to be plugged (see paragraphs 1.02 to 1.05 and 4.03 to 4.05);
- (b) if it is considered that the loophole should be plugged, of the following options identified in Chapter Four, which one(s) would be preferred:
 - (i) Option 1: restricting resigning Members from participating in any by-election in the same term (see paragraphs 4.07 and 4.08);
 - (ii) Option 2: a replacement mechanism using the same candidate list followed by a precedence list system as proposed by the Administration (see paragraphs 4.09 to 4.15);
 - (iii) Option 3: a replacement mechanism which does not cover causal vacancies arising from death, serious illness or other involuntary circumstances (see paragraphs 4.16 to 4.18);
 - (iv) Option 4: a replacement mechanism using the same candidate list, followed by leaving the seat vacant when the list is exhausted (see paragraphs 4.19 and 4.20);
- (c) if it is considered that the loophole need not be plugged, whether the status quo should be maintained i.e. no

legislative amendment will be made, a by-election will be held if a Member resigns, the resigning Member can stand in the resulting by-election, and a considerable amount of public funds will be spent (see paragraphs 1.02 to 1.05 and 4.03 to 4.05);

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

Ways of providing views and comments

5.07 Please send us your views by mail, facsimile or email on or before **24 September 2011**:

Address: Constitutional and Mainland Affairs Bureau
Room 308, 3/F, Main Wing
Central Government Offices
Lower Albert Road
Hong Kong

Fax number: 2523 3207

E-mail address: afv_consultation@cmab.gov.hk

5.08 It is voluntary for members of the public to supply their personal data upon providing views on this consultation document. The submissions and personal data collected may be transferred to the relevant Government bureaux and departments for purposes directly related to this consultation exercise. The Government bureaux and departments receiving the data may only use the data for such purposes.

- 5.09 The names and views of individuals and organisations who/which put forth submissions in response to this consultation document (“senders”) may be published for public viewing. We may, either in discussion with others, whether privately or publicly, or in any subsequent report, cite comments submitted in response to this consultation document.
- 5.10 To safeguard senders’ data privacy, we will remove senders’ relevant data, such as residential/return addresses, email addresses, identity card numbers, telephone numbers, facsimile numbers and signatures, where provided, when publishing their submissions.
- 5.11 We will respect the wish of senders to remain anonymous and/or keep the views confidential in part or in whole. If the senders request anonymity in the submissions, their names will be removed when publishing their views. If the senders request confidentiality, their submissions will not be published.
- 5.12 If the senders do not request anonymity or confidentiality in the submissions, it will be assumed that the senders can be named and the views can be published in their entirety.
- 5.13 Any sender providing personal data to this Bureau in the submission will have rights of access and correction with respect to such personal data. Any requests for data access and correction of personal data should be made in writing to:

Address: Assistant Secretary (2A)
Constitutional and Mainland Affairs Bureau
3/F, East Wing
Central Government Offices
Lower Albert Road
Hong Kong

Fax number: 2523 3207

Email Address: afv_consultation@cmab.gov.hk

Overseas Arrangements for Filling Mid-term Vacancies

This Annex provides information on the arrangements for filling mid-term vacancies in some overseas jurisdictions that we have surveyed.

Arrangements for filling mid-term vacancies in seats returned by the first-past-the-post system in general elections

2. In jurisdictions adopting the first-past-the-post system in general elections, a by-election is usually held in the event that a mid-term vacancy arises. Below are some examples.

Canada

3. The federal Parliament of Canada consists of the Senate (upper chamber), which normally has 105 members appointed by the Governor General on the recommendation of the Prime Minister, and the House of Commons (lower chamber), with 308 members elected by citizens who vote in general elections or by-elections.

4. In every electoral district, the candidate with the most votes wins a seat in the House of Commons and represents that electoral district as its Member of Parliament (MP). An absolute majority (more than 50 percent of the votes in the electoral district) is not required for a candidate to be elected. When a seat in the Parliament becomes vacant, a by-election will be held.

(Source: The Electoral System of Canada (2nd edition, 2007), Elections Canada, at http://www.elections.ca/res/canelecsys_e.pdf)

India

5. The Parliament of India consists of the President, the *Lok Sabha* (House of the People) and the *Rajya Sabha* (Council of States). The country has been divided into a number of Parliamentary Constituencies, each of which returns one MP to the *Lok Sabha*, the lower house of the Parliament, using the first-past-the-post system. As for the members of the *Rajya Sabha*, they are mainly elected by the legislative assembly of each state using the single transferable vote system, rather than by the citizens at large.

6. When the seat of a member elected under the first-past-the-post system to the House of the People becomes vacant or is declared vacant or his election to the House of the People is declared void, a by-election will be held to fill the vacancy.

(Source: Election Commission of India, “The Electoral System of India”, at <http://www.doccentre.org/docsweb/Electoral-Reforms/Electoral-System-India.htm>; Manual of Election Law (2004), volume I, at http://eci.nic.in/eci_main/ElectoralLaws/HandBooks/MANUAL_OF_LAW_VOL_I.pdf)

United Kingdom

7. In a general election, each constituency in the United Kingdom (the UK) elects one MP to a seat in the House of Commons. MPs are elected from a choice of candidates by a simple majority system in which each person casts one vote. The candidate with the most votes then becomes the MP for that constituency. A by-election takes place when a seat in the House of Commons becomes vacant between general elections.

(Source: Voting systems in the UK, at <http://www.parliament.uk/about/how/elections-and-voting/voting-systems>)

Arrangements for filling mid-term vacancies in seats returned by the proportional representation system in general elections

8. We have surveyed the arrangements for filling vacancies in some overseas jurisdictions where some or all of the seats are returned using the proportional representation system in general elections. In jurisdictions where the list proportional representation system is adopted in general elections, in general, a mid-term vacancy will be filled by a candidate who has not been elected and who is from the same list as that of the vacating member. Where the single transferable vote system is adopted in general elections, a mid-term vacancy is filled by either recounting the ballot papers that were received by the vacating member to determine which candidate was the next most favoured candidate chosen by the voters who elected the vacating member, or by a by-election.

9. Some overseas practices are set out below.

Jurisdictions adopting the list proportional representation system in general elections

Austria

10. Austria has a bicameral Parliament. The *National Council* (lower house) of Austria consists of 183 members who are elected under the proportional representation system. Each elector votes for a party and may cast one preferential vote for any one candidate from the provincial party list and the regional party list of the party he/she has voted for. If a vacancy arises, in general the next candidate acquiring the next highest number of votes from the same corresponding party list will fill the vacancy. No by-election will be held.

(Source: Federal Law on Parliamentary Elections at http://www.ris.bka.gv.at/Dokumente/Erv/ERV_1992_471/ERV_1992_471.pdf)

Belgium

11. Belgium has a bicameral Parliament. Elections to the *Chamber of Representatives* (the Lower House) are by a list proportional representation system. Each political party presents a list by constituency. The list of candidates of each political party includes candidates for full members and candidates for substitute members. The maximum number of substitutes on a list of candidates must be half of the number of full members plus one. The minimum number of substitutes on a list of candidates is six. On the same list, a candidate can stand both to be a full member and a substitute.

12. Electors can vote either for the entire list, with the candidates in the order in which they appear; or they can vote for one or several candidates by name, be they candidates for full membership or substitutes. For every list of which one or several candidates are elected full Members, the substitutes are proclaimed first substitute, second substitute, third substitute and so on in the order of the number of votes they have received. If a seat becomes vacant during the term of the Chamber for whatever reason, the departing Member will be replaced by a substitute from the same list, starting with the first substitute and if the first substitute is not available, the second, and so on.

(Source: website of the Federal Government, D-G Institutions and Population at <http://www.ibz.rrn.fgov.be/>)

The Czech Republic

13. The Czech Republic has a bicameral Parliament. The *Chamber of Deputies* (lower house) of the Czech Republic consists of 200 members who are elected under the proportional representation system. Each elector votes for a list of candidates of a political party, movement or coalition and may further indicate preference for up to four candidates on that list. If the mandate of any Deputy has terminated during his/her term of office for any reason, the mandate shall be taken by the first candidate who has not been elected and who was next on the list of candidates of the same political party, movement or coalition. If no alternate member is included in the candidate list of the same political party, political movement or coalition, the mandate remains vacant for the remainder of the electoral term. No by-election will be held.

(Source: Act of Law on elections to the Parliament of the Czech Republic at <http://www.psp.cz/cgi-bin/eng/docs/laws/1995/247.html>)

Denmark

14. 175 seats are reserved for Denmark proper for the Danish Parliament, the *Folketing*, and 135 seats are distributed among the constituencies based on proportional representation and the other 40 seats are distributed among the parties.

15. When a member of the *Folketing* ceases to be a member, gets incapacitated or requests leave of absence for a period of a minimum of seven days, a substitute will be called to fill the seat during the vacant period. The substitute will be taken from the list of the same constituency as the member leaving the *Folketing*. In the event that the party does not have a substitute in that particular constituency, the seat shall be transferred to the multi-member constituency in the region nearest entitled to the seat. If there is no substitute for that region, the seat shall be transferred to the multi-member constituency in the other two regions taken together where the party has the largest quotient which did not give a compensatory seat. If the list of substitutes has been exhausted and no substitute has been appointed then the *Folketing* will decide whether by-elections should be called.

(Source: Parliamentary Election Act of Denmark at http://www.ft.dk/~media/Pdf_materiale/Pdf_publicationer/English/valgloven_eng_web_samlet%20pdf.ashx;

Standing Orders of the Folketing at http://www.ft.dk/English/~media/Pdf_materiale/Pdf_publicationer/English/Standing_Orders_of_the_Folketing%20pdf.ashx)

Finland

16. Finland has a unicameral Parliament, the *Eduskunta*, with 200 members. Currently, there are 15 electoral districts in Finland and each district elects a certain number of parliamentary representatives proportional to the population of that district, with the exception that the electoral district of Åland is always elected one representative. Finnish parliamentary election adopts the proportional representation system, in which each party or group gains seats in relation to the votes cast for it compared with the votes cast for other groups.

17. If a vacancy in the Finnish Parliament arises, the vacancy will be filled by the deputy representative for the outgoing Member of the Parliament. This deputy representative is the first candidate on the list who has not been elected on the list from the party or from the joint list which the Member represents, or if there was an electoral alliance, the first candidate who has not been elected from the said electoral alliance which the Member represents. However, if there is no more deputy representative from the same party, joint list or electoral alliance which the Member represents, then the deputy representative shall be that candidate who has not been elected whose name is the first name in the master name list of all candidates ranked according to their comparative indexes.

(Source: Election Act of Finland at <http://www.finlex.fi/pdf/saadkaan/E9980714.PDF>)

Germany

18. Germany has a bicameral federal Parliament. Each elector has two votes for the *Bundestag* (lower chamber). One vote is for individual candidates under the first-past-the-post system while the second vote is for lists of candidates under the proportional representation system. If a vacancy arises due to death or resignation of a member or any other reasons in respect of an elected seat under the proportional representation system, the vacant seat will be filled by the next candidate on the same list of the same party if the candidate is still in the party. If there is no candidate on the same list to fill the vacancy, the seat will remain vacant till the end of the term. No by-election will be held.

(Source: Federal Elections Act at http://www.bundeswahlleiter.de/en/bundestagswahlen/downloads/rechtsgrundlagen/bundeswahlgesetz_engl.pdf)

Hungary

19. Hungary has a unicameral Parliament. The *National Assembly* of Hungary consists of 386 members. Each voter has two votes for the *National Assembly*. One vote is for a candidate in the voter's single-seat local constituency under the first-past-the-post system and the other is cast for a party list in a multi-seat regional constituency under the proportional representation system. If a casual vacancy arises in a single-seat constituency, a by-election will be held. If a casual vacancy arises in a multi-seat constituency, a candidate from the original party list as named by the party concerned, or in lack of such candidate the next in turn on the list, will fill the vacancy, and no by-election will be held.

(Source: Act on the Election of Members of Parliament at http://www.valasztas.hu/en/parval2010/296/296_2_2.html)

Japan

20. The Diet of Japan consists of two houses. There are 480 members for the Lower House and they are elected in two categories. 300 members are elected from 300 districts for the national election purpose under the first-past-the-post system. The other 180 members are elected from 11 electoral blocks. These seats are allocated to different political parties according to the numbers of votes they have (i.e. a proportional representation system).

21. If there is a vacancy in one of the 300 districts, a by-election will be held. If a member returned under the proportional representation system resigned or vacated his or her seat for other reasons, his or her seat will be filled by another member of the same party. No by-election will be held to fill the vacancy.

(Source: Public Officer Election Act at <http://law.e-gov.go.jp/htmldata/S25/S25HO100.html>)

Lithuania

22. The legislature of Lithuania, the *Seimas*, is composed of 141 seats, of which 71 are returned from 71 single-member constituencies, while one multi-member constituency will return 70 seats by proportional representation. Every Lithuanian citizen who has the right to vote shall have one vote in a single-member constituency and one vote in the multi-member constituency. On a ballot paper of a single-member constituency, the voter shall mark the name of the candidate whom he or she is voting for. On a ballot paper of the multi-member constituency, the voter shall mark the list of candidates whom he or she is voting for; and if he or she would like to express his preference of candidates on the list, he or she shall enter the election numbers of the five chosen candidates. In this way, preference votes are given for the candidates.

23. If a vacancy occurs, it shall be filled in the following manner –
- (a) *single-member constituency* – by-election shall be organised to fill the vacancy within six months.
 - (b) *multi-member constituency* – the first candidate, who has not received the mandate of *Seimas* member, from the list of candidates according to which the former *Seimas* member was elected to the presently vacant seat, shall become a *Seimas* member. If there are no candidates on this list of candidates who have not received mandates, the mandate of *Seimas* member shall be transferred to another list according to the sequence of the lists of candidates which was established after the election for the distribution of mandates by the method of remainders, i.e. to the list following the list which was the last to receive the mandate according to this sequence.

(Source: Law on Election to the Seimas at http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=389872)

New Zealand

24. The mixed member proportional system is used in New Zealand. It gives each voter two votes, an electorate vote and a party vote. Electorate votes are counted in each electorate on the basis of first-past-the-post. Party votes are counted across the entire country using a proportional representation formula.

25. A by-election is held to fill a vacancy in an electorate seat. On the other hand, a vacancy in the seat of a member who was elected from a party list does not require a by-election. The candidate in the highest order of preference on the same party list with the member who has vacated his or her seat will fill the vacancy if the candidate is still alive and remains a member of that political party. If that person has died or is no longer a member of that political party or does not signify his or her willingness to be a member, the following candidate in order of preference on the party list will fill the vacancy, and so on, in descending order of preference, until one of the candidates who remains a member of the party signifies his or her willingness to be a member. If there are no more candidates in the order of preference on the party list, the vacancy will remain vacant and will not be filled until the next general election.

(Source: Electoral system - voting method and electorates at <http://www.elections.org.nz/study/education-centre/concepts/free-fair-elections/elector-al-system>; NZ Electoral Commission at <http://www.elections.org.nz/elections/by-elections/by-elections.html>; Electoral Act 1993 at <http://www.legislation.govt.nz/act/public/1993/0087/latest/DLM307519.html>)

Poland

26. Poland has a bicameral Parliament. The *Sejm* (lower house) of Poland consists of 460 members and they are elected under the proportional representation system. If a vacancy arises due to death or resignation of a member etc., the next candidate having the largest number of votes on the same list of candidates will fill in the vacancy. If there is no candidate on the same list to fill the vacancy, the seat will remain vacant till the end of the term. No by-election will be held.

(Source: Chancellery of the Sejm)

Slovak Republic

27. The Slovak Republic has a unicameral Parliament. The *National Council* of the Slovak Republic consists of 150 members who are elected under the proportional representation system. Each elector votes for a list of candidates submitted by a political party or coalition and may further indicate preference for up to four candidates on the list. If a vacancy arises, the candidate who has the next highest number of votes on the list of the same political party or coalition will generally fill the vacancy. No by-election will be held.

(Source: Act on elections to the National Council of the Slovak Republic at http://aceproject.org/ero-en/regions/europe/SK/Election_Law_slovakia.pdf)

Slovenia

28. The *National Assembly* of Slovenia consists of 90 members who are elected under the proportional representation system. Each elector votes for one candidate. The candidate must come from a list of candidates submitted by a political party or coalition. If a casual vacancy arises, the candidate who has the next highest number of votes from the same list of candidates as the outgoing member will fill the vacancy. A by-election will, however, be held if the vacancy cannot be filled by the operation of the replacement mechanism.

(Source: National Assembly Elections Act at <http://www.legislationline.org/documents/action/popup/id/3825>)

Switzerland

29. Switzerland has a bicameral Parliament. The *National Council* (lower house) of Switzerland consists of 200 members from 26 constituencies. For single-seat constituencies, the members are elected under the first-past-the-post system. For multi-seat constituencies, they are elected under the proportional representation system. If a vacancy arises in a multi-seat constituency, the next candidate having the largest number of votes from the same list of candidates will fill the vacancy, and a by-election will be held if the vacancy cannot be filled by the operation of the replacement mechanism in the end.

(Source: Federal Act on Political Rights at http://www.admin.ch/ch/e/rs/161_1/index.html; Switzerland's Official Web Portal at http://www.ch.ch/ueber_uns/index.html?lang=en)

Jurisdictions adopting the single transferable vote system in general elections

30. In jurisdictions adopting the single transferable vote system in general elections, some fill a mid-term vacancy by recounting the ballot papers received by the vacating member to determine which candidate was the next most favoured candidate chosen by the voters who elected the vacating member. On the other hand, in Ireland, a by-election is held.

Australian Capital Territory and Tasmania

31. In the Australian Capital Territory Legislative Assembly and the Tasmanian House of Assembly, members are elected by proportional representation in the form of a single transferable vote system. Any vacancy is filled by recounting the ballot papers that were received by the vacating member to determine which candidate was the next most favoured candidate chosen by the voters who elected the vacating member.

(Source: Elections ACT Factsheet at <http://www.elections.act.gov.au/page/view/432/title/elections-act-factsheet-hare-clark>; Tasmanian Parliamentary Library at <http://www.parliament.tas.gov.au/tpl/Backg/HA Elections.htm>)

Ireland

32. Ireland is a parliamentary democracy. The National Parliament (*Oireachtas*) consists of the President and two Houses: *Dail Eireann* (the House of Representatives) and *Seanad Eireann* (the Senate). The *Dail Eireann* (lower house) has 166 seats and its members are elected using the proportional representation system by means of the single transferable vote. The *Seanad Eireann* (upper house) has 60 members and its members are elected through a system of electoral colleges. The elections are also held on the basis of the proportional representation system by means of the single transferable vote.

33. A casual vacancy in the membership of the *Seanad Eireann* and the *Dail Eireann* occasioned by the death, resignation, or disqualification of a member is filled by a by-election.

(Sources: Acts of the Oireachtas at <http://www.acts.ie/> and Constitution of Ireland at <http://www.taoiseach.gov.ie/eng/>; How the Dáil (Lower House of Parliament) is Elected, Department of the Environment, Heritage and Local Government, Ireland, February 2011, at <http://www.environ.ie/en/LocalGovernment/Voting/PublicationsDocuments/FileDownload,1869,en.pdf>; How the Seanad (Senate) is Elected, Department of the Environment, Heritage and Local Government, Ireland, February 2011, at <http://www.environ.ie/en/LocalGovernment/Voting/PublicationsDocuments/FileDownload,3724,en.pdf>)

**Bills Committee on
Legislative Council (Amendment) Bill 2011**

Replacement Mechanism

Introduction

During the discussions of the Bills Committee on the Legislative Council (Amendment) Bill 2011, various Members pointed out that the replacement mechanism based on the “precedence list of candidates with the largest remaining number of votes” should not be used to cover incidents whereby Members have passed away or are unable to discharge their duties due to serious illness. This is because such Members do not leave their office intentionally or voluntarily, and therefore should be differentiated from those resigning from office on their own initiative.

2. Various Members also pointed out that if a LegCo Member resigns and is replaced by a candidate on the precedence list, its replacement Member may come from a different political party. This will have two effects-

- (a) the 30,000 to 50,000 votes which supported the election of the resigning Member would lose their effect; and
- (b) the proportion of seats under the proportional representation election system would be changed as a result.

Revised replacement mechanism

3. We note the views that vacancies arising from death and serious illness of Members should be differentiated from those due to voluntary resignation of Members. However, we consider it important to ensure that a consistent approach is adopted for handling vacancies which arise due to various reasons.

4. Having given the above views very close and careful consideration, the Government has concluded that we should revise the replacement mechanism as follows-

- (a) henceforth, if any vacancy arises under section 15 of the Legislative Council Ordinance or Article 79 of the Basic Law (including those due to death, serious illness, resignation, or disqualification of Members due to other reasons), the vacancy will be filled by the candidate who is of the highest order of the

priority among the candidate list of the Member who has resigned from or vacated his seat;

- (b) this will then preserve the choice of voters expressed through the previous general election. The proportion of seats allocated among different political parties and lists will be maintained;
- (c) for voters concerned, they will know clearly that in the general election, their support for a particular list of candidates representing a particular political party or grouping can be retained for the four-year term;
- (d) if the candidates remaining on the candidate list of the Member vacating his seat do not wish or are ineligible to fill the vacancy, or if there is no other candidate remaining on the candidate list, then the precedence list of candidates with the largest remaining votes will be used to fill the vacancy according to the proposals embodied in the Amendment Bill and Committee Stage Amendments already presented; and
- (e) if the vacancy cannot be filled by sub-paragraph (a) and (d) above, a by-election will be held to fill the vacancy.

5. The revised scheme will continue to ensure that-

- (a) if Legislative Council Members choose to resign, there will be no unnecessary by-elections;
- (b) Members who resign will be replaced within a short period either by the candidates from his own candidate list or a replacement from the precedence list of candidates with the largest remaining votes;
- (c) there will be no unnecessary public expenditure incurred; and
- (d) the smooth operation of the Legislative Council and service to the public will be maintained to the largest extent possible.

6. Committee Stage Amendments (“CSAs”) putting the above proposals into effect will be put to the Bills Committee separately, together with other CSAs already discussed.

Constitutional & Mainland Affairs Bureau
June 2011

An illustration of Option 2

An illustration of Option 2 using a hypothetical example is set out in Table 1. In this example, there are five seats in a geographical constituency (“GC”) and the total number of votes cast at the general election for all of the lists in the GC is 200 000. The quota for a Member to be returned is 40 000 votes according to section 49 of the Legislative Council Ordinance (Cap. 542) (“LCO”). If a list obtains 40 000 votes, one Member will be returned for that list. Since in this example not all the seats are filled by applying the quota, the largest remainder method will apply. The list with the largest remaining number of votes will return one Member, and the list with the second largest remaining number of votes will return another Member until all the seats are filled. The votes obtained by the five lists of candidates in this example are shown in Table 1 below and Candidates A1, A2, B1, B2 and C1 will be returned as Members.

Table 1

Number of seats : 5
Total number of votes cast : 200 000
Quota for a Member to be returned : 40 000

List of candidates		Total number of votes	Votes deducted to obtain a seat	Number of remaining votes
A	Candidate A1 (elected)	68 000	40 000	
	Candidate A2 (elected)		28 000	
	<i>Candidate A3</i> (not elected)			
	<i>Candidate A4</i> (not elected)			
B	Candidate B1 (elected)	64 000	40 000	
	Candidate B2 (elected)		24 000	
	<i>Candidate B3</i> (not elected)			

List of candidates		Total number of votes	Votes deducted to obtain a seat	Number of remaining votes
C	Candidate C1 (elected)	25 000	25 000	
	Candidate C2 (not elected)			
	Candidate C3 (not elected)			
D	<u>Candidate D1</u> (not elected)	22 000		22 000
	Candidate D2 (not elected)			
E	<u>Candidate E1</u> (not elected)	21 000		21 000
	Candidate E2 (not elected)			

Compilation of precedence list

2. A precedence list will be compiled based on the remaining number of votes of the candidate lists, after deducting the votes used to return a seat/seats for the respective lists in the general election. The first candidate who has not been elected on the list which has the largest remaining number of votes will rank first on the precedence list. The first candidate who has not been elected on the list which has the second largest remaining number of votes will rank second on the precedence list, and so on. A precedence list in accordance with the remaining number of votes for the example in Table 1 is as follows:

Precedence List	
Order of Priority	
1	Candidate D1
2	Candidate E1

Filling of mid-term vacancies under Option 2

3. If Candidate A1 or A2 vacates his or her seat mid-term:
- (a) the vacancy will first be filled by Candidate A3 (the same list arrangement);
 - (b) if Candidate A3 is ineligible or unwilling to fill the vacancy, Candidate A4 will fill it (the same list arrangement);

- (c) if Candidate A4 is ineligible or unwilling to fill the vacancy as well, the vacancy cannot be filled by the same list and the precedence list will be used;
- (d) Candidate D1 on List D, who is the first candidate on the precedence list, will then fill the vacancy;
- (e) if Candidate D1 is ineligible or unwilling to fill the vacancy, the next person on the precedence list, who is Candidate E1 on List E, will be fill the vacancy; and
- (f) if Candidate E1 is ineligible or unwilling to fill the vacancy, the vacancy cannot be filled by the operation of the precedence list and a by-election will be held.

Legend for Table 1

Candidates returned as Members in general election (paragraph 1) - **bold**

Candidates to fill the vacancy under the same list arrangement (paragraph 3(a) and 3(b)) - *italics*

Candidates to fill the vacancy by the operation of the precedence list (paragraph 3(d) and 3(e)) - underlined

**Relevant provisions of the Legislative Council Ordinance as amended by the
Legislative Council (Amendment) Bill 2011 and
the proposed Committee Stage Amendments (if enacted)**

Provisions/Amendments	Colour Represented
1. Original text of the relevant provisions of the Legislative Council Ordinance	Black
2. Relevant provisions of the Legislative Council Ordinance as amended by the Legislative Council (Amendment) Bill 2011 and the proposed Committee Stage Amendments (if enacted)	Black (Bold)

12. How long Members are to hold office

- (1) Subject to sections 13 and 15, a person returned as a Member at a general election holds office from the beginning of the term of office of the Legislative Council next following the election and vacates office at the end of the term.
- (2) Subject to sections 13 and 15, a person who is declared to be returned as a Member at a by-election holds office from the date on which the result of the by-election was declared and vacates office at the end of the term of office of the Legislative Council during which the by-election was held.
- (3) **Subject to section 15, a person who becomes a Member under section 35A or 35B—**
 - (a) **holds office from the date on which the declaration is made under section 35A(5) or 35B(5), as the case may be, in relation to the person; and**
 - (b) **vacates office at the end of the term of office of the Legislative Council during which the declaration is made.**

13. Acceptance of office as a Member

- (1) **Subject to subsection (5),** a person who is elected as a Member is to be regarded as having accepted office as such unless the person gives written notice to the Clerk to the Legislative Council of non-acceptance of office within 7 days after the date on which notification of the person's election is published in the Gazette.
- (2) A notice of non-acceptance is not effective unless it is signed by the person concerned.
- (3) A notice of non-acceptance takes effect on the date on which the notice is received by the Clerk to the Legislative Council and the person giving the notice is taken to have resigned from office as a Member from that date.
- (4) If a person gives notice in accordance with this section, the Clerk to the Legislative Council must, within 21 days after receiving the notice, publish in the Gazette a notice to the effect that the person has not accepted office as a Member. (Amended 48 of 1999 s. 9)
- (5) **This section does not apply to a person who accepts office as a Member under section 35A or 35B.**

35. Vacancy in membership of Legislative Council to be declared

- (1) The Clerk to the Legislative Council must, by notice published in the Gazette, declare the existence of a vacancy in the membership of that Council within 21 days after becoming aware of the vacancy.
- (2) (Repealed 48 of 1999 s. 20)

35A. Filling of vacancy in membership of Legislative Council for geographical constituencies and District Council (second) functional constituency by candidates on same list of candidates

- (1) This section applies if—**
 - (a) the office of a Member returned for any geographical constituency or the District Council (second) functional constituency becomes vacant under section 15 or 72 otherwise than within the 4 months preceding the end of the Legislative Council's current term of office; and**
 - (b) on the list of candidates through which that Member was elected as such (*the relevant list of candidates*) there is at least one person who—**
 - (i) was not duly elected as a Member in the relevant general election;**
 - (ii) is alive;**
 - (iii) is not a Member for the time being; and**
 - (iv) never become a Member under this section during the Legislative Council's current term of office.**
- (2) If the Clerk to the Legislative Council declares under section 35 the existence of a vacancy in the membership of that Council in any geographical constituency or the District Council (second) functional constituency, the Returning Officer appointed for the constituency concerned must comply with subsection (3) in relation to the vacancy.**
- (3) The Returning Officer must deliver a notice to—**
 - (a) if there is only one person on the relevant list of candidates who falls within subsection (1)(b)(i), (ii), (iii) and (iv), that person;**
 - (b) if there are 2 or more persons on the relevant list of candidates who fall within subsection (1)(b)(i), (ii), (iii) and (iv), the person who ranks highest on the list amongst such persons.**
- (4) A person to whom a notice is delivered under subsection (3) may, within 7 days after the date on which the notice is delivered, signify his or her acceptance of office as a Member by a written confirmation sent to the Returning Officer.**
- (5) If the Returning Officer—**
 - (a) receives a confirmation from a person in accordance with subsection (4); and**
 - (b) determines, upon an inquiry, that the person is eligible to become a Member,**

the Returning Officer must, as soon as practicable, publicly declare that the person has been elected as a Member and upon the declaration the person becomes a Member.
- (6) For the purposes of subsection (5), a person is eligible to become a Member if the person—**
 - (a) does not fall within paragraph (a), (b), (c), (g), (h) or (i) of section 39(1);**
 - (b) on the date on which the confirmation is sent by the person under subsection (4), is not serving a sentence of imprisonment;**

- (c) does not, had there been an election on the date referred to in paragraph (b) for the constituency concerned, fall within paragraph (f) of section 39(1);
 - (d) has not been convicted in the manner set out in subparagraph (i), (ii), (iii) or (iv) of section 39(1)(e) after the last election conducted for the constituency concerned; and
 - (e) has not been found under the Mental Health Ordinance (Cap. 136) to be incapable, by reason of mental incapacity, of managing and administering his or her property and affairs.
- (7) If a vacancy in the membership of the Legislative Council is not filled by a person (*the former*) to whom a notice is delivered under subsection (3) and there is at least one other person on the relevant list of candidates who falls within subsection (1)(b)(i), (ii), (iii) and (iv)—
- (a) the former is to be regarded, during the Legislative Council's current term of office, as not being on the relevant list of candidates for the purposes of this section; and
 - (b) the Returning Officer must comply with subsections (3) and (5) in relation to the vacancy and to the relevant list of candidates.
- (8) For the purposes of any provision of any Ordinance—
- (a) a person who becomes a Member under subsection (5) is to be regarded as a Member elected as such; and
 - (b) the process through which the person becomes a Member under this section is to be regarded as a part of the result of the relevant election,
- if the context of the provision, having regard to the purposes of the provision, so requires.
- (9) If a vacancy in the membership of the Legislative Council to which this section applies is not filled by the operation of the preceding subsections of this section, the Returning officer must publicly declare that the vacancy is not filled under this section.
- (10) A Returning Officer who makes a declaration under subsection (5) or (9) must publish the declaration in the Gazette.

35B. Filling of vacancy in membership of Legislative Council for geographical constituencies and District Council (second) functional constituency by means of precedence list

- (1) This section applies if—
- (a) the office of a Member returned for any geographical constituency or the District Council (second) functional constituency becomes vacant under section 15 or 72 otherwise than within the 4 months preceding the end of the Legislative Council's current term of office;
 - (aa) the vacancy is not filled under section 35A; and
 - (b) subject to sections 67(2C) and 70B(a)(vi), there is a precedence list for that constituency.

- (2) As soon as reasonably practicable after making a declaration in relation to the vacancy under section 35A(9), the Returning Officer appointed for the constituency concerned must comply with subsection (3) in relation to the vacancy.
- (3) The Returning Officer must deliver a notice to the person who ranks highest on the precedence list for the constituency concerned.
- (4) A person to whom a notice is delivered under subsection (3) may, within 7 days after the date on which the notice is delivered, signify his or her acceptance of office as a Member by a written confirmation sent to the Returning Officer.
- (5) If the Returning Officer—
 - (a) receives a confirmation from a person in accordance with subsection (4); and
 - (b) determines, upon an inquiry, that the person is eligible to become a Member,
 the Returning Officer must, as soon as practicable, publicly declare that the person has been elected as a Member and upon the declaration the person becomes a Member.
- (6) For the purposes of subsection (5), a person is eligible to become a Member if the person—
 - (a) does not fall within paragraph (a), (b), (c), (g), (h) or (i) of section 39(1);
 - (b) on the date on which the confirmation is sent by the person under subsection (4), is not serving a sentence of imprisonment;
 - (c) does not, had there been an election on the date referred to in paragraph (b) for the constituency concerned, fall within paragraph (f) of section 39(1);
 - (d) has not been convicted in the manner set out in subparagraph (i), (ii), (iii) or (iv) of section 39(1)(e) after the last election conducted for the constituency concerned; and
 - (e) has not been found under the Mental Health Ordinance (Cap. 136) to be incapable, by reason of mental incapacity, of managing and administering his or her property and affairs.
- (7) If a vacancy in the membership of the Legislative Council is not filled by a person to whom a notice is delivered under subsection (3)—
 - (a) the precedence list for the constituency concerned is revised by removing the name of the person from the list; and
 - (b) the Returning Officer must comply with subsections (3) and (5) in relation to the vacancy and to the list as revised.
- (8) For the purposes of any provision of any Ordinance—
 - (a) a person who becomes a Member under subsection (5) is to be regarded as a Member elected as such; and
 - (b) the process through which the person becomes a Member under this section is to be regarded as a part of the result of the relevant election,
 if the context of the provision, having regard to the purposes of the provision, so requires.
- (9) If a vacancy in the membership of the Legislative Council to which this section applies is not filled by the operation of the preceding

subsections of this section, the Returning Officer must publicly declare that the vacancy is not filled under this section.

- (10) A Returning Officer who makes a declaration under subsection (5) or (9) must publish the declaration in the Gazette.
- (11) In this section, a reference to a precedence list for a constituency means a precedence list published under section 58B in relation to that constituency following the last election conducted for that constituency.
- (12) For the purposes of subsection (3)—
 - (a) if there is only one person on a precedence list, the person is regarded as ranking highest on the list; and
 - (b) a person on the list who is for the time being a Member is to be regarded as not being on the list.

36. By-election to be held to fill vacancy in membership of Legislative Council

- (1) The Electoral Affairs Commission must, in accordance with regulations in force under the Electoral Affairs Commission Ordinance (Cap 541), arrange for a by-election to be held in the following circumstances and not otherwise-
 - (a) **unless section 35A or 35B applies**, on the making of a declaration as to the existence of a vacancy in the membership of the Legislative Council under section 35;
 - (aa) **on the making of a declaration under subsection (9) of section 35B that a vacancy in the membership of the Legislative Council is not filled under that section;**
 - (b) on the making of a declaration under section 42C that the proceedings for the election for a functional constituency have been terminated;
 - (c) on the making of a declaration under section 46(2) that an election for a constituency has failed because no candidates were validly nominated for election or because the number validly nominated for election was less than the number of Members to be returned for the constituency; (Amended 25 of 2003 s. 19)
 - (ca) on the making of a declaration under section 46A(1) that the proceedings for the election for a constituency have been terminated; (Added 48 of 1999 s. 21. Amended 25 of 2003 s. 19)
 - (cb) on the making of a declaration under section 46A(3) that an election for a constituency has failed- (Amended 25 of 2003 s. 19)
 - (i) because of the death or disqualification of the successful candidate at the election; or
 - (ii) because the number of candidates returned at the election was less than the number of Members to be returned for the constituency due to the death or disqualification of a successful candidate; (Added 48 of 1999 s. 21. Amended 25 of 2003 s. 19)
 - (d) subject to sections 70A and 72(1A), on the Court's making a determination under section 67 that a person whose election is

questioned was not duly elected and that no other person was duly elected instead; (Amended 48 of 1999 s. 21. Amended 18 of 2011 s. 3)

- (e) if an appeal against a determination referred to in paragraph (d) is lodged to the Court of Final Appeal—
 - (i) on the Court of Final Appeal's making a determination under section 70B that a person whose election is questioned was not duly elected and that no other person was duly elected instead; or
 - (ii) on the termination of the appeal proceedings in other circumstances (Added 18 of 2011 s. 3).
- (2) However, a by-election to fill a vacancy occurring in the membership of the Legislative Council is not to be held—
 - (a) within the 4 months preceding the end of that Council's current term of office; or
 - (b) if the Chief Executive has published in the Gazette an order dissolving that Council in accordance with the Basic Law.

58B. Precedence list for geographical constituencies and District Council (second) functional constituency

- (1) **If in a general election the election to return the Members for any geographical constituency or the District Council (second) functional constituency is a contested election, the Returning Officer appointed for the constituency must, as soon as practicable after the completion of the counting of votes in respect of the election —**
 - (a) **compile a precedence list for that constituency in accordance with subsections (2), (3), (4) and (5); and**
 - (b) **publish the list by notice in the Gazette.**
- (2) **A precedence list compiled under this section for a constituency is to consist of—**
 - (a) **where any list of candidates for that constituency in the relevant general election has obtained any number of valid votes but has no candidate who is duly elected in that election, the name of—**
 - (i) **if there is only one candidate on the list of candidates, the only candidate; or**
 - (ii) **if there are 2 or more candidates on the list of candidates, the candidate who ranks first on the list of candidates;**
 - (b) **where any list of candidates for that constituency in the relevant general election—**
 - (i) **has any candidate who is duly elected in that election;**
 - (ii) **has any candidate who is not duly elected in that election; and**
 - (iii) **has any remaining number of votes which did not return a candidate under section 49(8)(a),**
the name of the candidate who is not duly elected and who ranks immediately after the candidate who is, or the candidates who are, duly elected on the list of candidates; and

- (c) where—
 - (i) the Court or the Court of Final Appeal determines that a person on a list of candidates who was originally declared to have been duly elected as a Member was not duly elected as a Member; and
 - (ii) the sole ground for the determination is that the number of valid votes obtained by the list of candidates was less than that obtained by another list of candidates or other lists of candidates,
the name of that candidate.
- (3) Subject to subsection (5), on a precedence list the names of the persons are to be ranked in order of priority according to the number of votes those persons respectively have with the person who has the largest number of votes ranked first.
- (4) For the purposes of subsection (3)—
 - (a) a person who is a candidate referred to in subsection (2)(a)(i) or (ii) is to be regarded as having the votes obtained by the list of candidates in which the name of the person appears;
 - (b) a person who is a candidate referred to in subsection (2)(b) is to be regarded as having a number of votes that is equal to the remaining number of votes referred to in subsection (2)(b)(iii) obtained by the list of candidates in which the name of the person appears;
 - (c) the number of votes which a candidate referred to in subsection (2)(c) has is—
 - (i) if the candidate also falls within subsection (2)(a)(i) or (ii), determined by reference to paragraph (a); or
 - (ii) if the candidate also falls within subsection (2)(b), determined by reference to paragraph (b),
having regard to the determination of the Court or the Court of Final Appeal by virtue of which the name of the person is added on the precedence list.
- (5) If 2 or more persons have the same number of votes under subsection (4), the Returning Officer must determine the order of priority of those persons on the precedence list by drawing lots.
- (6) A precedence list published under this section—
 - (a) is, if any person whose name is included in the list becomes a Member under section 35A or 35B, revised by removing that name from the list;
 - (aa) is, if any person whose name is included in the list becomes a Member by virtue of a determination of the Court or the Court of Final Appeal under section 67 or 70B, revised by removing that name from the list;
 - (b) is, if any person whose name is included in the list dies, revised by removing that name from the list;
 - (ba) is, if the Court or the Court of Final Appeal makes a determination described in subsection (2)(c) in relation to a person, revised, subject to subsections (3), (4) and (5), by adding the name of that person on the list;

- (bb) is, if the Court or the Court of Final Appeal determines under section 67(2A) or 70B(a)(iii) that the name of a person which is not included in the list is to be included in the list, revised, subject to subsections (3), (4) and (5), by adding that name on the list;
 - (bc) is, if the Court or the Court of Final Appeal determines under section 67(2A) or 70B(a)(iii) that the name of a person which is included in the list is not to be included in the list, revised by removing that name from the list;
 - (bd) is, if the Court or the Court of Final Appeal determines under section 67(2B) or 70B(a)(iv) that a particular ranking of a person on the list is correct, revised, if necessary, by reflecting that ranking; and
 - (c) is also revised in the circumstances specified in section 35B(7)(a).
- (6A) If a precedence list published under this section is revised under subsection (6) or section 35B(7), the Returning Officer must, by notice in the Gazette—
- (a) announce the revision; and
 - (b) publish the list as revised.
- (7) If all the names included in a precedence list published under this section have been removed from the list under subsection (6) or section 35B(7), the list ceases to exist for the purposes of this Ordinance.

61. Election etc. may be questioned only by election petition made on specified grounds

- (1) An election to return a Member may be questioned only on the following grounds-
- (a) the ground that the person declared by the Returning Officer in accordance with regulations in force under the Electoral Affairs Commission Ordinance (Cap. 541) to have been elected as a Member at the election was not duly elected because-
 - (i) the person was ineligible to be, or was disqualified from being, a candidate at the election; or
 - (ia) **(in the case of a person who becomes a Member under section 35A) the person is not eligible to become a Member under section 35A(6); or**
 - (ib) **(in the case of a person who becomes a Member under section 35B) the person is not eligible to become a Member under section 35B(6); or**
 - (ii) corrupt or illegal conduct was engaged in by or in respect of that person at or in connection with the election; or (Amended 10 of 2000 s. 47)
 - (iii) corrupt or illegal conduct was generally prevalent at or in connection with the election; or (Amended 10 of 2000 s. 47)

- (iv) material irregularity occurred in relation to the election, or to the polling or counting of votes at the election; or
- (b) a ground specified in any other enactment that enables an election to be questioned.
- (2) An election to return a Member may be questioned only by an election petition lodged under section 62.
- (2A) A decision of a Returning Officer under section 58B as to—**
 - (a) whether to include the name of a person in a precedence list; or**
 - (b) the ranking of a person on a precedence list,****may be questioned only by an election petition lodged under section 62 and only on any of the grounds specified in subsection (2B).**
- (2B) The grounds are—**
 - (a) the ground that a person whose name is included in the precedence list was ineligible to be, or was disqualified from being, a candidate at the relevant election;**
 - (b) the ground that corrupt or illegal conduct was engaged in by or in respect of any person whose name is included in the precedence list at or in connection with the relevant election;**
 - (c) the ground that corrupt or illegal conduct was generally prevalent at or in connection with the relevant election; and**
 - (d) the ground that material irregularity occurred in relation to—**
 - (i) the relevant election;**
 - (ii) the polling or counting of votes at the relevant election; or**
 - (iii) the compilation of the precedence list.**
- (3) In this section-
"corrupt or illegal conduct" (舞弊或非法行爲) means corrupt or illegal conduct in contravention of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap 554);
"election" (選舉) includes nomination proceedings and the decisions of the Returning Officer or any Assistant Returning Officer. (Replaced 10 of 2000 s. 47)

63. Who may be made respondent to election petition

- (1) Any person whose election is questioned by an election petition and the Returning Officer in respect of the election may be made a respondent to the petition.
- (1A) If—**
 - (a) the inclusion of the name of a person in a precedence list published under section 58B; or**
 - (b) the ranking of a person on a precedence list published under section 58B,****is questioned by an election petition, the person and the Returning Officer who published the list may be made a respondent to the petition.**
- (1B) If the exclusion of the name of a person from a precedence list published under section 58B is questioned by an election petition, the**

Returning Officer who published the list may be made a respondent to the petition.

- (2) Two or more candidates at an election may be made respondents to the same election petition and their cases may be tried at the same time, but for the purposes of this Part, and in relation to any order for giving security for costs, the petition is taken to be a separate election petition against each respondent.

65. Period within which election petition and appeal must be lodged

- (1) An election petition questioning an election may be lodged only during the period of 2 months following the date on which the Returning Officer has published the result of the election in the Gazette.
- (2) Despite section 24 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484), notice of a motion for the purpose of an application for leave to appeal to the Court of Final Appeal under section 22(1)(c) of that Ordinance must be filed within 14 working days after the date on which the written judgment of the Court to be appealed from is handed down, and the applicant must give the opposite party 3 days' notice of his or her intended application at any time during the period of 14 working days.
- (3) **An election petition questioning—**
 - (a) **the inclusion of the name of a person in a precedence list published under section 58B;**
 - (b) **the exclusion of the name of a person from a precedence list published under section 58B; or**
 - (c) **the ranking of a person on a precedence list published under section 58B,****may be lodged only during the period of 2 months following the date on which the list is published.**

67. Court to determine election petition

- (1) At the end of the trial of an election petition that relates to an election that was not contested, the Court must determine whether any decision of the Returning Officer as to the validity of a nomination was correct and, if not correct, determine whether the person declared by that Officer to have been elected in that election was or was not duly elected.
 - (2) At the end of the trial of an election petition in relation to an election that was contested, the Court must determine whether the person whose election is questioned was or was not duly elected and, if not duly elected, determine whether some other person was duly elected instead.
- (2AA) At the end of the trial of an election petition that questions a person's eligibility to become a Member under section 35A or 35B, the Court must determine whether the person is eligible to become a Member under that section.**

- (2A) **At the end of the trial of an election petition that relates to the inclusion of the name of a person in, or the exclusion of the name of a person from, a precedence list published under section 58B, the Court must determine whether the name is to be included in the list.**
- (2B) **At the end of the trial of an election petition that relates to the ranking of a person on a precedence list published under section 58B, the Court must determine whether the ranking of the person on the list is correct and, if not correct, what is the correct ranking.**
- (2C) **At the end of the trial of an election petition in which the validity of a precedence list published under section 58B is questioned due to a determination of the Court under subsection (2A) or (2B) in relation to any candidate on the list, the Court must determine whether the list is valid.**
- (3) At the end of the trial of an election petition, the Court must announce its determination by means of a written judgment.
- (4) (Repealed 18 of 2011 s. 9)
- (5) The Court may, on its own initiative, provide the Secretary for Constitutional and Mainland Affairs, or the Electoral Affairs Commission or the Clerk to the Legislative Council with a report on any matter arising in the course of the trial of an election petition if in its opinion the matter should be reported. (Amended L.N. 130 of 2007)
- (6) The Court must comply with any request made by the Secretary for Constitutional and Mainland Affairs or the Electoral Affairs Commission to provide a report on any specified matter arising from the trial of an election petition. (Amended L.N. 130 of 2007)
- (7) If, at the end of the trial of an election petition, it appears to the Court that a specified person may have engaged in corrupt or illegal conduct at or in connection with the election, the Court is required to provide the Director of Public Prosecutions with a report giving details of the conduct. (Added 10 of 2000 s. 47)

70B. Court of Final Appeal's determination

At the end of the hearing of an appeal against the determination of the Court of an election petition, the Court of Final Appeal must—

- (a) determine—
 - (i) if the election petition relates to an election that was not contested—
 - (A) whether the decision of the Returning Officer as to the validity of the relevant nomination was correct; and
 - (B) if the decision was not correct, whether the person declared to have been elected in that election was or was not duly elected;
 - (ii) if the election petition relates to an election that was contested—
 - (A) whether the person whose election is questioned was or was not duly elected; and

- (B) if the person was not duly elected, whether some other person was duly elected in place of the person;
- (iii) **if the election petition questions a person's eligibility to become a Member under section 35A or 35B, whether the person is eligible to become a Member under that section;**
- (iv) **if the election petition relates to—**
 - (A) **the inclusion of the name of a person in;** or
 - (B) **the exclusion of the name of a person from, a precedence list published under section 58B, whether the name is to be included in the list;**
- (v) **if the election petition relates to the ranking of a person on a precedence list published under section 58B—**
 - (A) **whether the ranking of the person on the list is correct; and**
 - (B) **if not correct, what is the correct ranking;**
- (vi) **if in the hearing the validity of a precedence list published under section 58B is questioned due to a determination of the Court under section 67(2A) or (2B) in relation to any candidate on the list, whether the list is valid; and**
- (b) announce its determination by means of a written judgment.

78. Appointment of Returning Officers and assistants

- (1) The Electoral Affairs Commission must appoint for each constituency a Returning Officer and such number of Assistant Returning Officers as appears to the Commission to be **necessary—**
 - (a) **to enable an election to be held in the constituency; and**
 - (b) **for the operation of sections 35A, 35B and 58B.**
- (2) (Repealed 21 of 2001 s. 70)
- (3) A Returning Officer has such functions and duties as are conferred or imposed on that Officer by or under this Ordinance.
- (4) An Assistant Returning Officer may, with the authority of the Returning Officer concerned, exercise and perform the functions and duties of Returning Officer.
- (5) The Electoral Affairs Commission must publish in the Gazette a notice of the appointment of a Returning Officer and that Officer's address.
- (6) The executive authorities of the Government must ensure that each Returning Officer is provided with such staff as that Officer requires in order to exercise and perform that Officer's functions and duties under this Ordinance.
- (7) Expenses properly incurred by a Returning Officer in the exercise or performance of that Officer's functions or duties under this Ordinance or the Electoral Affairs Commission Ordinance (Cap 541) are a charge on, and are payable from, the general revenue.

Legislative Council (Amendment) Bill 2011

Bills Committee

Revised Proposal to the Replacement Mechanism

1. In relation to the present legislative proposal, the Department of Justice would like to point out the following legal principles and considerations:

- (a) By-election is not the only lawful means to fill a casual vacancy. The Basic Law and the HKBOR do not require that any casual vacancy of the Legislature must be filled by means of a by-election. A replacement mechanism would not amount to an unconstitutional deprivation of the right to vote or the right to stand for election merely because no by-election would be held to fill a casual vacancy.
- (b) Since by-election is not a must, options other than holding a by-election to fill a casual vacancy may be considered and adopted by the Administration provided they are objective and fair, and pursue legitimate aims.
- (c) In designing the electoral system, the Government and the Legislature may seek changes in the electoral process to resolve or deal with problems. The HKSAR Government and the Legislature enjoy a wide margin of appreciation in managing its electoral affairs. As pointed out in paragraph 55 of the judgment of Ma CJ in *Mok Charles Peter v Tam Wai Ho*, FACV 8/2010 (13 December 2010), a case concerning electoral matters, the concept of margin of appreciation is well established in our courts. It has been applied by the courts in relation to the views of the Legislature. Furthermore, Article 68 and Annex II of the Basic Law give the Legislative Council a broad discretion in determining the contents of the legislation which governs the “specific method” forming the Legislative Council.

- (d) One of the reasons why the Administration introduces the legislative proposal is to address the perceived mischief arising from the resignation of Members in 2010 in order to trigger a by-election.
- (i) The Government understands that some have questioned whether this can be a sufficient and lawful justification for the present legislative proposal. We consider that this is a lawful and legitimate objective to pursue. We must, however, emphasise that the legislative proposal is not concerned with whatever political subject to which any so-called de facto referendum relates. The proposal is introduced to deal with the problems arising from the resignation (for whatever reasons) of Members who then proceed to stand in the by-elections occasioned.
- (ii) The Administration considers that the Government and the Legislature are entitled to regard the above conduct as amounting to an abuse of process. Viewed objectively, (1) electors will be deprived of their right to have a Member representing them in the conduct of the business of the Legislative Council for a period of time from the Member's resignation to the conduct of a by-election; (2) the Legislative Council will be deprived of the service of one Member during the above-mentioned period; (3) the resignation and the subsequent by-election will cost public money. The expenditure for the 2010 by-elections amounted to \$1.26 billion; (4) lastly, in view of the low turnout in the by-election held in 2010, and if the phenomenon of a Member resigning and then standing in the subsequent by-election becomes a frequent occurrence, this would undermine the respect for the electoral process itself.
- (iii) Even if there are no Members resigning and subsequently standing in the by-elections, the legislative proposal can avoid some of the possible downsides of holding by-elections. These downsides include: (1) the huge expenditure incurred by holding by-elections; (2) the

Legislative Council will be deprived of the service of a Member and the Member as a representative of his/her constituent between his/her resignation and the by-election; and (3) holding a by-election would mean the “*de facto*” adoption of the first-past-the-post election system, which is not the list proportional representation system used in the general election. We note that some other jurisdictions have also adopted methods other than by-election to fill casual vacancies of their legislatures. As such, the legislative proposal will also engage merits that are inherent in the use of mechanisms other than by-election to fill a casual vacancy.

- (e) Under the original proposal, replacement for a vacant seat in the Legislative Council would be chosen by reference to the results of the previous general election. As such, we consider that it could give effect to the free expression of the will of the electors in the general election as a whole. In addition, since the replacement mechanism would be based on the results of the previous general election, it would be consistent with the principle of the proportional representation electoral system, and the Legislative Council would still be “constituted by election” under Article 68 of the Basic Law.

2. Nonetheless, the Administration has been listening carefully to the different views expressed by the public on the original proposal, and has decided to fine-tune the proposal by putting forward the revised proposal. We consider that the revised proposal can address the concerns which have been raised over the contents of the replacement mechanism:

- (a) The revised proposal provides for a casual vacancy to be filled initially by the first candidate on the same list as the vacating Member’s. Such arrangement will give effect to the free expression of the will of those electors in the general election who voted in favour of the list to which the outgoing Member belongs.

- (b) Where the candidates remaining on the same list as the vacating Member's do not wish or are ineligible to fill the vacancy, or if there is no other candidate remaining on the list, the revised proposal retains the replacement mechanism of the original proposal as a fallback arrangement, i.e. the precedence list of candidates with the largest number of remainder votes will be used to fill the vacancy. By-election will be held only if there is no more candidate on the precedence list.

- (c) Under the revised proposal, filling casual vacancies by reference to the precedence list of candidates is a fallback arrangement. It is envisaged that in practice in most cases, casual vacancies would be filled by candidates on the same list as the vacating Member(s), and the fallback arrangement would only be used rarely, unless the resignations take place in unusual circumstances and all remaining candidates on the same list are unwilling to fill the vacancies. If this were to happen, it might well involve the very mischief which the current legislative exercise seeks to address.

- (d) The fallback arrangement will only come into operation when there is no more candidate on the list of the vacating Member who is able or willing to fill the vacancy:
 - (i) first, this arrangement ensures that the will of the electors voting for that list will be fully reflected and realised;

 - (ii) second, the fallback arrangement only comes into operation when there is no candidate on the list of the vacating Member who is able or willing to fill the vacancy. Hence, the arrangement would not deprive the votes cast in favour of the candidates on that list of their value, nor would it transfer the value of these votes to others. There is therefore no question of the revised proposal distorting the will expressed by the electors when they cast their votes in the election;

- (iii) third, in these circumstances, there is ample justification to fill the casual vacancy by the candidate who obtained the largest number of remainder votes. This is because the method is fair, reasonable, objective and highly transparent. It is based entirely on the results of the previous election, reflects the wishes of the electors as a whole, and is consistent with the principle of the proportional representation electoral system. The Legislative Council would still be “constituted by election” under Article 68 of the Basic Law after a casual vacancy has been filled in this manner;
 - (iv) fourth, the fallback arrangement could generally address the perceived mischief arising from resignations aimed at triggering a by-election, and could avoid some of the downsides associated with the holding of a by-election to fill a casual vacancy.
- (e) Some earlier submissions have used examples to illustrate how the use of the precedence list of candidates to fill casual vacancies may give rise to unreasonable situations in certain circumstances, for example, the vacancy may be filled by candidates from another list which may have obtained only a small number of votes. The Administration would like to point out:
- (i) first, this situation is unlikely to arise under the revised proposal, because casual vacancies would generally be filled by candidates from the same list;
 - (ii) second, the situations envisaged in the examples would only occur in extremely unusual and very rare circumstances, for example, when there are two Members in the same constituency from the same list resigning in the same term whether consecutively or at the same time. This has never happened before. In fact, if such unusual phenomenon were to happen, it might very likely involve circumstances similar to

the resignations in 2010 which were aimed at triggering a by-election. As pointed out above, this is precisely the mischief that the legislative exercise seeks to remedy.

3. As for independent candidates, their right to stand for general elections is not affected by the replacement mechanism:

- (a) First, it is the personal decision and right of each candidate as to whether he/she will stand for election as an independent candidate or join up with other candidates to form a list.
- (b) When an elected independent Member vacates his/her seat, the vacancy would be filled with reference to the precedence list. Since the Member is fully aware of the operation of the replacement mechanism and the availability of other alternatives but has chosen to stand for election as an independent candidate and not stand for election jointly with other candidates, there is no question of any other candidate on the list of that Member being “deprived” of the value of their votes.
- (c) Nor would this distort the will of the electors in voting for the Member since, with the Member vacating his/her seat, the effect of the votes cast in his/her favour would have been exhausted, and cannot be transferred to others. Under such circumstances, the Legislature can apply an open, fair and objective arrangement to identify a successor to fill the vacancy.
- (d) Using the precedence list of candidates to fill a seat left vacant by an outgoing independent Member can maintain the consistency and uniformity of the system.

4. In conclusion, the Administration considers that the revised proposal can provide an objective and fair means to fill a casual vacancy in a constituency for which the list proportional representation system has been adopted. Taking the scheme as a whole,

the revised proposal represents a reasonable and workable rule of certainty, and is consistent with the provisions of the Basic Law and the HKBOR. The revised proposal is a lawful solution within the discretionary area of judgment of the Legislature.

Department of Justice

July 2011

An illustration of Option 4

An illustration of Option 4 using a hypothetical example is set out in Table 2. In this example, there are five seats in a geographical constituency (“GC”) and the total number of votes cast at the general election for all of the lists in the GC is 200 000. The quota for a Member to be returned is 40 000 votes according to section 49 of the Legislative Council Ordinance (Cap. 542) (“LCO”). If a list obtains 40 000 votes, one Member will be returned for that list. Since in this example not all the seats are filled by applying the quota, the largest remainder method will apply. The list with the largest remaining number of votes will return one Member, and the list with the second largest remaining number of votes will return another Member until all of seats are filled. The votes obtained by the five lists of candidates in this example are shown in Table 2 below and Candidates A1, A2, B1, B2 and C1 will be returned as Members.

Table 2

Number of seats : 5
Total number of votes cast : 200 000
Quota for a Member to be returned : 40 000

List of candidates		Total number of votes	Votes deducted to obtain a seat	Number of remaining votes
A	Candidate A1 (elected)	68 000	40 000	
	Candidate A2 (elected)		28 000	
	<i>Candidate A3</i> (not elected)			
	<i>Candidate A4</i> (not elected)			
B	Candidate B1 (elected)	64 000	40 000	
	Candidate B2 (elected)		24 000	
	<i>Candidate B3</i> (not elected)			

List of candidates		Total number of votes	Votes deducted to obtain a seat	Number of remaining votes
C	Candidate C1 (elected)	25 000	25 000	
	Candidate C2 (not elected)			
	Candidate C3 (not elected)			
D	Candidate D1 (not elected)	22 000		22 000
	Candidate D2 (not elected)			
E	Candidate E1 (not elected)	21 000		21 000
	Candidate E2 (not elected)			

Filling of mid-term vacancies under Option 4

2. Under Option 4, a mid-term vacancy will first be filled by a candidate from the same candidate list as that of the vacating Member. If there is no candidate on the same list who is eligible and willing to fill the vacancy, then the seat will be left vacant for the rest of the term.

3. Using Table 2 as an example, if Candidate A1 or A2 vacates his or her seat mid-term:

- (a) the vacancy will first be filled by Candidate A3 on the same list;
- (b) if Candidate A3 is ineligible or unwilling to fill the vacancy, Candidate A4 will fill it: and
- (c) if Candidate A4 is ineligible or unwilling to fill the vacancy as well, the vacancy cannot be filled and the seat will be left vacant for the rest of the term.

Legend for Table 2

Candidates returned as Members in general election (paragraph 1) - **bold**
Candidates to fill the vacancy under the same list arrangement (paragraph 3(a) and 3(b)) - *italics*