

Legislative Council Panel on Constitutional Affairs

**Arrangements for filling vacancies
in the Legislative Council**

This paper sets out the Administration's proposed arrangement for filling a vacancy arising from resignation of Legislative Council ("LegCo") Members and other situations.

BACKGROUND

2. Article 25 of the Basic Law provides that all Hong Kong residents shall be equal before the law. Article 26 provides that permanent residents of the Hong Kong Special Administrative Region ("HKSAR") shall have the right to vote and the right to stand for election in accordance with law. Article 68 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. Article 69 provides that the term of office of the LegCo shall be four years, except for the first term which shall be two years. While the Basic Law does not provide for the resignation of Members, Article 79 (at the Annex) provides for the circumstances under which a Member is no longer qualified for the office.

Situations giving rise to vacancy

3. The LCO provides for the constitution, convening and dissolution of the LegCo, the election of LegCo 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 Ordinance 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")¹;
- (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.

4. 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 Electoral Affairs Commission ("EAC") must, in accordance with regulations in force under the Electoral Affairs Commission Ordinance (Cap. 541), 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 conditions under section 39, eligible for re-election as a Member.

Resignation of 5 Members in January 2010

5. On 25 January 2010, five LegCo Members gave written notice of resignation to the Clerk to the LegCo with the aim to force by-elections in all the five GCs of the territory. Their resignation took effect from 29 January 2010. The EAC conducted a by-election on 16 May 2010 to fill the five vacancies in accordance with the LCO. The five resigned Members were all re-elected, but the by-election had a record low voter turnout rate of 17%.

¹ 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.

6. There are calls for the current arrangement under which a vacant seat should be filled up by a by-election to be reviewed. In fact, since the handover, the Government has spent around \$174 million on the conduct of three LegCo by-elections². The 2010 LegCo by-election cost around \$126 million. It was considered by members of the public and some political parties as an unnecessary and significant drain on public resources, which could have been deployed for other more productive purposes. There are also views that there should be a mechanism to facilitate the speedy replacement of any vacant LegCo seat in order to maintain the integrity and operation of the LegCo.

REVIEW OF THE EXISTING REPLACEMENT ARRANGEMENT

7. Against the above background, the Administration has undertaken a review on the subject with a view to identifying another replacement arrangement (other than holding a by-election) which could return a candidate to take up the vacant seat. We have assessed the replacement arrangement with reference to the following criteria:

- (a) whether it complies with the Basic Law and is reasonable from the legal perspective;
- (b) whether it is consistent with the election system in Hong Kong; and
- (c) whether it can reflect the views of the electorate over the candidates.

Existing replacement arrangement in Hong Kong

8. The LegCo election in Hong Kong has adopted the list proportional representation voting system for GCs since 1998. The intention of the existing system, whereby a single vote cast by an elector 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

² The three LegCo by-elections were the 2000 LegCo by-election (Hong Kong Island GC), the 2007 LegCo by-election (Hong Kong Island GC) and the 2010 LegCo by-election (5 GCs).

the number of seats they fill. In addition, under this system, parties winning a small percentage of the votes may be able to secure seats which they would not be able to achieve under the first-past-the-post voting system³. Under the existing arrangement, at a GC general election, an elector is entitled to cast a single vote for a list of candidates. The number of valid votes cast for the election of the GC will be divided by the number of vacancies to be elected 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 vacancies 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.

9. While the list voting system is adopted for a GC general election, the system does not apply to a by-election. A by-election is held when a vacancy in the LegCo membership arises mid-term under the situations set out in paragraphs 3(a) to 3(e). In a GC, this results in a by-election for a single seat, which is filled through the first-past-the-post voting system. This was the case in the 2000 and the 2007 LegCo Hong Kong Island by-elections and the 2010 LegCo GC by-election. Where the office of a Member is vacated, the seat would most likely be filled by a candidate from one of the major parties or a candidate supported by them. Candidates from the small parties would not stand much chance as otherwise exists in the proportional representation electoral system. An alternative replacement arrangement whereby both large and small political parties or groups stand a chance of gaining seats in a proportional representation system is preferred.

Overseas practice

10. A survey of the replacement arrangements for filling vacancies in some countries where the list proportional representation voting system is practised shows that by-elections are not used to return candidates to fill vacant seats arising mid-term. Instead, reference to the election result of the preceding general election will form the basis of returning a candidate to fill a vacancy. In countries where the list proportional representation system is practised, electors cast their votes for the list of

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

candidates whose election platform is endorsed by them. The list of candidates is, in most cases, representing a single political party and advocating the views of that political party. Therefore, it is quite common in those countries that the vacancy would be filled by the first candidate who has not been elected in the same list of candidate as the resigned member. In Germany, if a vacancy arises in respect of an elected seat of the *Bundestag* (lower chamber), the vacant seat is filled by the next candidate in the list of the same party. The *Sejin* (lower house) of Poland and Parliament of Finland have similar arrangements.

11. Another example of proportional representation replacement mechanism is that practised in the Australian Capital Territory Legislative Assembly and the Tasmanian House of Assembly. In these two jurisdictions, members are elected by proportional representation in the form of a single transferable vote system. Any vacancies are 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.

PROPOSAL

12. Although the LegCo election in Hong Kong has adopted the list voting system, the current replacement arrangement for filling a vacancy arising mid-term (i.e. through by-elections) cannot reflect fully the list proportional representation system. From the perspective of the design of the electoral system, there is also merit in exploring whether a better alternative replacement arrangement is available. Taking into account the situation in Hong Kong, we propose that if a vacancy arises mid-term in the LegCo, it should be filled by the first candidate who has not yet been elected in the list with the largest number of remainder votes.

13. We believe that the proposal suits Hong Kong. It will be consistent with the proportional representation electoral system. This replacement mechanism can reflect the overall will of the electorate expressed during the general election. The following considerations are pertinent:

- (a) electors in Hong Kong vote according to the political parties or groups which they wish to support. At the same time, they also cast their votes on the basis of the lists which have candidates who are more well known. Hence, the number of votes obtained by a list of candidates to a significant extent hinges on the presence of individual well-known candidates. Thus, once a candidate has resigned, it is reasonable to assume that in the absence of that candidate, his list may not receive the same level of support. One cannot assume that the votes used by the resigned Member could again be accorded to the list he belonged to;
- (b) furthermore, from the perspective of the electoral system, once an incumbent LegCo Member resigns, his votes should go with him as he has already used the quota of the votes to take up his seat; and
- (c) the political party system in Hong Kong is still evolving. In fact, political party politics in Hong Kong have not yet evolved to an extent whereby in the general election, voters can choose between two or three major political parties.

14. Accordingly, it is proposed that:

- (a) when a Member who represents his list of candidates chooses to resign, the first candidate who has not yet been elected in the list with the largest number of remainder votes will fill the vacant seat;
- (b) in the event that the list of the resigned Member still maintains the largest number of remainder votes after discounting the votes of the resigned Member, the next candidate on that list who has not been elected could fill the vacancy;
- (c) we propose that the first candidate who has not yet been elected in the list of candidates with the largest remainder votes is to be returned to fill the vacant seat only if that candidate confirms (within a specified time) a willingness to serve; and

- (d) if the candidate concerned has died, or is now disqualified or does not wish to serve, the first unelected candidate on the list with the second largest number of remainder votes will fill the vacancy and so on.

Scope of the replacement arrangement

Vacancies arising from other situations

15. We propose that the replacement arrangement will not only cover vacancies arising from resignation but also other situations specified under section 15 of the LCO and Article 79 of the Basic Law. The considerations are that when a vacancy arises as and when a Member passes away or is disqualified due to various reasons, the reference to the result of the preceding general election will indicate the preference of the electorate for the most suitable replacement. This will also obviate the need for holding by-elections under these situations. This ensures that the same arrangements will apply to the filling of vacancies arising in different circumstances.

DC (second) FC

16. We also propose to apply the replacement arrangement set out in paragraph 14 to the five new DC (second) FC seats in the 2012 LegCo election. Similar to the GCs, we will adopt the list proportional representation system for returning the five DC (second) FC seats under which lists of candidates (rather than individual candidates as the case for the existing FCs) will stand for election for the new seats. As the voting arrangements for the DC (second) FC will be similar to that for GCs, the replacement arrangement for GCs may also apply to a vacancy for the DC (second) FC.

Areas not covered by replacement mechanism

Traditional FCs

17. The list proportional representation voting system for GCs does not apply to the existing 28 traditional FCs which are single seat constituencies except for the Labour FC which comprises three seats. For the four FCs with small electorates, a single transferable vote system is adopted. For the remaining 24 FCs a simple majority or “first-past-the-post” system is adopted. We do not propose to adopt the replacement arrangement specified in paragraph 14 above to the existing FCs having considered relevant factors including:

- (a) according to information available to us, we are not aware of any jurisdiction adopting such an arrangement for constituencies which do not adopt a list system;
- (b) it would not be appropriate to return a candidate who had lost in the general election under the first-past-the-post system. This would not be able to reflect the overall will of the electorate, as in the case of a proportional representation system; and
- (c) the existing arrangement for replacing vacancies for traditional FCs through holding by-elections has been operating well and is generally accepted by the public.

These traditional FCs do not adopt the list proportional representation voting system. Accordingly, by-elections will be held to fill the vacancies.

Timing of implementation of replacement mechanism

18. As the electorate in the 2008 general election of GC Members were not aware that the results of that election would be used to determine which candidate on the lists who had not been elected might be returned to fill an office left vacant by a resigned Member, we consider it appropriate to implement the proposed replacement mechanism starting from the fifth term of the LegCo on 1 October 2012.

LEGISLATIVE TIMETABLE

19. We plan to amend the relevant provisions under the LCO in order to implement the replacement arrangement for filling vacancies arising from the GCs or DC (second) FC as soon as possible.

ADVICE SOUGHT

20. Members are invited to comment on the proposal set out in paragraphs 12-18 above.

Constitutional and Mainland Affairs Bureau

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Article 79 of the Basic Law

The President of the Legislative Council of the Hong Kong Special Administrative Region shall declare that a member of the Council is no longer qualified for the office under any of the following circumstances:

- (1) When he or she loses the ability to discharge his or her duties as a result of serious illness or other reasons;
- (2) When he or she, with no valid reason, is absent from meetings for three consecutive months without the consent of the President of the Legislative Council;
- (3) When he or she loses or renounces his or her status as a permanent resident of the Region;
- (4) When he or she accepts a government appointment and becomes a public servant;
- (5) When he or she is bankrupt or fails to comply with a court order to repay debts;
- (6) When he or she is convicted and sentenced to imprisonment for one month or more for a criminal offence committed within or outside the Region and is relieved of his or her duties by a motion passed by two-thirds of the members of the Legislative Council present; and
- (7) When he or she is censured for misbehaviour or breach of oath by a vote of two-thirds of the members of the Legislative Council present.