

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

Submissions by the Hong Kong Bar Association

We refer to the submission of the Hong Kong Bar Association to the Clerk to the Bills Committee on the Legislative Council (Amendment) Bill 2011 on 17 June 2011 and the further submission made by the Association on 21 June 2011, which set out the views of the Association on the proposed replacement arrangement. Our response to the submissions is set out at the Annex for Members' reference.

Constitutional and Mainland Affairs Bureau
June 2011

Relevant Provisions in Basic Law and Legislative Council Ordinance

Article 26 of the Basic Law 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 Legislative Council (“LegCo”) shall be constituted by election. The specific method for forming the LegCo is prescribed in Annex II of the Basic Law. Article 79 of the Basic Law provides for the circumstances under which a Member is no longer qualified for the office.

2. The Legislative Council Ordinance (Cap. 542) (“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 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”)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.

3. 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

¹ This does not apply to a Member elected for the legal functional constituency (“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.

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.

Background

4. On 25 January 2010, five LegCo Members gave written notice of resignation to the Clerk to the LegCo with the aim to force by-election in all the five geographical constituencies (“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%. The cost of holding the by-election ran up to HK\$126 million and was a strain on public funds. There are calls for the current arrangement under which a vacant seat should be filled up by a by-election to be reviewed. 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.

5. 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.

Voting System

6. 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 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 system².

7. While the list voting system is adopted for a GC general election, the system does not apply to a by-election for filling one single vacancy. A by-election is held when a vacancy in the LegCo membership arises mid-term under the situations set out in paragraphs 2(a) to (e). In a GC, this results in a by-election for a single seat, which in effect 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.

8. Hence, to conduct a by-election would introduce a first-past-the-post element into what is otherwise a proportional representation system for electing Members for the constituencies, thereby changing the nature of the election for the seats initially allocated under the proportional representation system. Where a list proportional representation system is in place, a by-election may not be the most suitable method to fill a casual vacancy.

Proposal

9. Although the LegCo GC general 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. Taking into account the existing voting system for GC general elections in Hong Kong (i.e. a proportional representation system) and the public concerns expressed over the resignation of legislators and the subsequent by-election last year, we propose to put in place a replacement mechanism whereby a vacancy arising mid-term in the GC would be filled by the first candidate who has not yet been elected in the list with the largest number of remainder votes.

10. It is proposed that:

² According to the first-past-the-post voting system, the candidate who obtains the greatest number of votes will be elected.

- (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; and
- (b) if the candidate concerned has died, or is now disqualified or does not wish to serve, the first candidate who has not been elected in the list with the second largest number of remainder votes will fill the vacancy.

Details of the proposal have been set out in the Legislative Council (Amendment) Bill 2011.

11. We propose that the above replacement arrangement will cover vacancies arising from resignation and other situations specified under section 15 of the LCO and Article 79 of the Basic Law. We also propose to apply the replacement arrangement to the five new District Council (second) functional constituency (“DC (second) FC”) seats to be established in the fifth term of the LegCo as the list proportional representation system is used for returning the five seats. As the traditional FCs do not adopt the list proportional representation voting system, by-elections will be held to fill the vacancies.

12. The Legislative Council (Amendment) Bill 2011 provides for the new electoral arrangements for the fifth term of office of the LegCo. We hope that the Bill could be passed within this LegCo session. The reason is that time should be given for electors to understand the effect of their votes to be cast in the LegCo election in September 2012. Aside from electing LegCo Members, these votes will collectively have the effect of identifying candidates for filling vacancies under the replacement mechanism. Also, persons who wish to stand in the DC election in November 2011 will also need to understand the replacement mechanism for the DC (second) FC in order to decide if they would take part in the DC election. We hope that, after the passage of the Bill, we will have a year’s time to allow the Government to undertake public education and publicity on the replacement mechanism.

13. As to the views expressed by the Hong Kong Bar Association, we would like to reply as follows:

- (1) Neither the Basic Law nor the Bill of Rights (“BOR”) requires that any casual vacancy must be filled by means of a by-election. Nor do they mandate that a vacancy be filled by any particular method. There are other electoral systems where casual vacancies are filled

by reference to votes cast in the previous general election instead of holding a by-election³. Because by-election is not a must, one cannot conclude that not using by-election to fill casual vacancies is tantamount to an unconstitutional deprivation of the right to vote or the right to stand for election.

- (2) 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. In the HKSAR, firstly it should be borne in mind that a proportional representation system is already in place whereby a single vote cast by electors can return representatives in a multiple-seat GC. Secondly, the Government and the Legislature are entitled to take into account the event which took place in 2010 when certain LegCo Members resigned from office in order to trigger a by-election in which the Members intended to stand and seek re-election. It is legitimate for the Government and the Legislature to consider the phenomenon to be contrary to public interests and to seek changes in the electoral process to address the perceived mischief, namely:
 - (a) deliberate resignations triggering by-elections which are unnecessary and could have been avoided. The constituents are deprived of representation during the period between the resignation and the by-election;
 - (b) a record low voter turnout rate for the 2010 by-election indicating that the resignation action lacked general public support; and
 - (c) the high cost of holding such by-election, which would be a strain on the public funds.
- (3) Under the proposed method, the votes originally cast in the previous general election in favour of the out-going LegCo Member had been “used” or “spent”. The replacement mechanism is consistent with the proportional representation system used in the GC general election. By choosing the replacement based on the votes cast by electors in the previous general election, it gives effect to the free expression of the will of the electors in the previous general election as a whole and in line with the spirit of the proportional representation system. The candidate selected to fill the casual

³ For example, Germany, Finland, Poland, Australian Capital Territory, Tasmania.

vacancy in this way is still chosen by reference to the result of the previous general election. Accordingly, even with the replacement mechanism introduced, the LegCo will continue to be “constituted by election” under Article 68 of the Basic Law.

- (4) Once the new election method is accepted by the Legislature and becomes law, electors will know that casting their votes under the new arrangement will have a “dual-effect”: apart from electing the LegCo Member in the immediate election, the votes collectively will have the effect of determining which candidate should fill any casual vacancy arising under the replacement mechanism.
- (5) This new electoral arrangement will be consistent with the proportional representation electoral system used in the GC general election. The replacement mechanism directly addresses the mischief as mentioned in sub-paragraph (2) above, which is a legitimate consideration by way of justification, and a proportionate response.
- (6) Furthermore, the right of permanent residents who are registered electors to vote and to stand for election in general elections is in no way affected by the proposed replacement mechanism. Moreover, the rules for the replacement mechanism, based on objective criteria, are transparent, fair and reasonable. These rules will be in place for electors and candidates to follow at the time of the general election. The Proposal is therefore consistent with BOR Article 21(b) and Article 26 of the Basic Law.
- (7) Finally, different jurisdictions are accorded a wide margin of appreciation in managing their electoral affairs and in stipulating conditions for the exercise of electoral rights. The Legislative Council (Amendment) Bill 2011 has been introduced by the HKSAR Government and it is for the LegCo to consider whether it is to be passed into law. Article 68 and Annex II of the Basic Law gives LegCo a broad discretion in determining the contents of legislation which governs the “specific method” for forming the LegCo. The legislation concerning the electoral system of Hong Kong is a matter for the LegCo to decide. The proposed replacement mechanism is a solution within the discretionary area of judgment of the Legislature. The introduction of the Bill is consistent with Annex II of the Basic Law.