

Bills Committee on Legislative Council (Amendment) Bill 2011

Committee Stage Amendments

Further to the paper submitted to the Bills Committee on 28 June on the revised replacement mechanism, this paper provides information on the revised Committee Stage Amendments (“CSAs”) to the Legislative Council (Amendment) Bill 2011 (“the Bill”).

Commencement Clause

2. We propose to amend the commencement clause in the Bill to the effect that all the sections come into operation on 1 September 2012. The amendment is proposed to enable that after the Legislative Council (“LegCo”) general election in September 2012, a Returning Officer shall be able to compile a precedence list and that the decision of a Returning Officer to include the name of a person in a precedence list or the ranking of a person on the list may be questioned by an election petition on specified grounds.

Revised Replacement Mechanism

3. New sections 35A and 67(2AA) will be added to provide for the revised replacement mechanism as follows-

- (a) if any vacancy in the membership of the LegCo for any geographical constituency (“GC”) and District Council (second) FC (“DC (second) FC”) arises under section 15 of the Legislative Council Ordinance (Cap. 542) (“LCO”) (including those due to death, resignation, disqualification of Members due to other reasons or the situations set out in Article 79 of the Basic Law), the vacancy will be filled by the candidate who ranks highest amongst the candidates on the candidate list of the Member who has resigned from or vacated his seat;
- (b) the Returning Officer must deliver a notice to the candidate who ranks highest under the proposed section 35A(3);
- (c) under the proposed section 35A(4), a person to whom a notice is so delivered 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;

- (d) under the proposed section 35A(5), if the Returning Officer receives a confirmation from the person and 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 becomes a Member and upon the declaration the person becomes a Member;
- (e) under the proposed section 35A(7), if the vacancy is not filled by a person to whom a notice is delivered and there is at least one other person on the relevant list of candidates who is eligible, the Returning Officer should deliver the notice to the candidate who ranks second highest on the list;
- (f) under the proposed section 35A(9), if a vacancy in the membership of the LegCo is not filled under the proposed section 35A, the Returning Officer must publicly declare that the vacancy is not filled; and
- (g) a proposed section 67(2AA) is added to extend the ground of lodging an election petition to the eligibility of the person to become a Member under the operation of the proposed section 35A. Similar powers have also been extended to the Court of Final Appeal (“CFA”) under the proposed section 70B.

Operation of the Precedence List

4. The original section 35A is now renumbered as section 35B. The proposed section 35B now provides that a vacancy will be filled by the operation of the precedence list, if the vacancy is not filled under the proposed section 35A. Other than this revision, the operation of the precedence list remains the same as earlier presented to the Bills Committee.

Determination of the Court of First Instance (“CFI”) or the CFA

5. The proposed sections 67(2A) and 70B provide that 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 the proposed section 58B or at the end of the hearing of an appeal against the determination of the CFI of an election petition, the CFI or the CFA, as the case may be, must determine

whether the name is to be included in the list. The proposed sections 58B(6)(bb) and 58B(6)(bc) now provide corresponding provisions so that after the determination of the CFI or the CFA under sections 67(2A) or 70B, the precedence list should be revised by adding a name on the list, or revised by removing a name from the list.

6. The proposed section 67(2C) provides that, at the end of the trial of an election petition in which the validity of a precedence list is questioned due to a determination of the CFI under the proposed sections 67(2A) and 67(2B) in relation to any candidate on the precedence list, the CFI must determine whether the precedence list is valid. Similar powers have also been extended to the CFA under the proposed section 70B.

CSAs

7. A full set of the CSAs is attached at the Annex for Members' reference.

Constitutional and Mainland Affairs Bureau
June 2011

Legislative Council (Amendment) Bill 2011

Committee Stage

Amendments to be moved by the Secretary for Constitutional and
Mainland Affairs

<u>Clause</u>	<u>Amendment Proposed</u>
1	By deleting subclauses (2) and (3) and substituting— “(2) This Ordinance comes into operation on 1 September 2012.”.
3	(a) In the proposed section 12(3), by deleting “sections 13 and 15, a person who becomes a Member under section 35A” and substituting “section 15, a person who becomes a Member under section 35A or 35B”. (b) In the proposed section 12(3)(a), by adding “or 35B(5), as the case may be,” after “35A(5)”.
4(2)	In the proposed section 13(5), by adding “or 35B” after “35A”.
5	(a) In the heading, by deleting “ Section 35A ” and substituting “ Sections 35A and 35B ”. (b) By renumbering the proposed section 35A as section 35B.

(c) By adding—

“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) has 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 fall 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.”.

- (d) In the proposed section 35B, in the heading, by deleting everything after “**Legislative Council**” and substituting “**for geographical constituencies and District Council (second) functional constituency by means of precedence list**”.
- (e) In the proposed section 35B(1)(a), by adding “or 72” after “15”.
- (f) In the proposed section 35B(1)(a), by deleting “and”.
- (g) In the proposed section 35B(1), by adding—
 - “(aa) the vacancy is not filled under section 35A; and”.
- (h) In the proposed section 35B(1)(b), by adding “subject to sections 67(2C) and 70B(a)(vi),” before “there”.
- (i) In the proposed section 35B(2), by deleting everything before “, the Returning” and substituting—
 - “(2) As soon as reasonably practicable after making a declaration in relation to the vacancy under section 35A(9)”.

- (j) In the proposed section 35B(5), by deleting “that the person becomes” and substituting “that the person has been elected as”.
- (k) By deleting the proposed section 35B(8) and substituting—
 - “(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.”.
- (l) In the proposed section 35B(11), by deleting “58A” and substituting “58B”.

6(1) By adding “or 35B” after “35A”.

6(2) In the proposed section 36(1)(aa), by deleting “35A” and substituting “35B”.

- 7
 - (a) In the heading, by deleting “**58A**” and substituting “**58B**”.
 - (b) By deleting “After section 58” and substituting “Before section 59”.
 - (c) By renumbering the proposed section 58A as section 58B.
 - (d) In the proposed section 58B(1), by deleting everything before “election—” and substituting—

- “(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”.
- (e) In the proposed section 58B(2), by deleting “subsection (1)” and substituting “this section”.
- (f) In the proposed section 58B(2)(a)(ii), by deleting “and”.
- (g) In the proposed section 58B(2)(b), by deleting the full stop and substituting “; and”.
- (h) In the proposed section 58B(2), by adding—
- “(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.”.
- (i) In the proposed section 58B(4)(b), by deleting the full stop and substituting a semicolon.
- (j) In the proposed section 58B(4), by adding—
- “(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.”.

- (k) In the proposed section 58B(6), by deleting “subsection (1)” and substituting “this section”.
- (l) In the proposed section 58B(6)(a), by adding “or 35B” after “35A”.
- (m) In the proposed section 58B(6), by adding—
 - “(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;”.
- (n) In the proposed section 58B(6)(b), by deleting “and”.
- (o) In the proposed section 58B(6), by adding—
 - “(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”.
- (p) In the proposed section 58B(6)(c), by deleting “35A(7)(a)” and substituting “35B(7)(a)”.
- (q) In the proposed section 58B, by adding—
 - “(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.”.

- (r) In the proposed section 58B(7), by deleting “subsection (1) have been removed from the list under subsection (6)(a) or (b) or section 35A(7)” and substituting “this section have been removed from the list under subsection (6) or section 35B(7)”.
- (s) By deleting the proposed section 58B(8) and (9).

8(2) By adding after the proposed section 61(1)(a)(ia)—

- “(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”.

- 8(3) (a) In the proposed section 61(2A), by deleting “58A” and substituting “58B”.
- (b) In the proposed section 61(2A), by adding “and only” after “62”.

- 9 (a) In the proposed section 63(1A)(a) and (b), by deleting “58A” and substituting “58B”.
- (b) In the proposed section 63(1B), by deleting everything after “section” and substituting “58B is questioned by an election petition, the Returning Officer who published the list may be made a respondent to the petition.”.

- 10
- (a) In the heading, by deleting “**is to**” and substituting “**and appeal must**”.
 - (b) By deleting subclause (1).
 - (c) In subclause (2), by deleting “65(1)” and substituting “65(2)”.
 - (d) In subclause (2), by renumbering the proposed section 65(2) as section 65(3).
 - (e) In subclause (2), in the proposed section 65(3)(a), (b) and (c), by deleting “58A” and substituting “58B”.
 - (f) In subclause (2), in the Chinese text, in the proposed section 65(3), by adding “只” before “可於”.
- 11
- (a) By adding before the proposed section 67(2A)—
 - “(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.”.
 - (b) In the proposed section 67(2A), by deleting “58A” and substituting “58B”.
 - (c) In the proposed section 67(2B), by deleting “58A” and substituting “58B”.
 - (d) By adding—
 - “(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.”.

New By adding—

“11A. Section 70B amended (Court of Final Appeal’s determination)

(1) Section 70B(a)(ii)(B)—

Repeal

“and”.

(2) After section 70B(a)(ii)—

Add

- “(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 subsection (2A) or (2B) in relation to any candidate on the list, whether the list is valid; and”.

12 In the proposed section 78(1)(b), by deleting “section 35A” and substituting “sections 35A, 35B and 58B”.

14 By adding “, 35B(3) and (4)” after “and (4)”.

15 By adding “, 35B(3) and (4)” after “and (4)”.