

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