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**Report of the Bills Committee on
Legislative Council (Amendment) Bill 2011**

Purpose

This paper reports on the deliberations of the Bills Committee on the Legislative Council (Amendment) Bill 2011 ("the Bills Committee").

Background

Situations giving rise to vacancy in the membership of the Legislative Council

Legislative Council Ordinance (Cap. 542)

2. The Legislative Council Ordinance (Cap. 542) ("LCO") provides for the constitution, convening and dissolution of the Legislative Council ("LegCo"), the election of LegCo Members, and other related matters. Under section 14 of LCO, a Member may, at any time, resign from office as a Member by giving written notice of resignation to the Clerk to LegCo. Section 15 of 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;

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 has 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.

- (d) is the President of 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 ("BL") ("BL 79") to be no longer qualified to hold that office.

The Basic Law

3. In accordance with BL 79, the President of LegCo of the Hong Kong Special Administrative Region ("HKSAR") 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 LegCo;
- (c) when he or she loses or renounces his or her status as a permanent resident of the Region;
- (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 Region and is relieved of his or her duties by a motion passed by two-thirds of Members present; and
- (g) when he or she is censured for misbehaviour or breach of oath by a vote of two-thirds of Members present.

Existing replacement arrangement

4. Under the existing arrangement, at a geographical constituency ("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 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 system, then the filling of the remaining seat(s) will be decided by the largest remainder of valid votes obtained by each list after the deduction of the used quota. While the list voting system is adopted for a GC general election, the system does not apply to a by-election which is required to be held when a vacancy in the LegCo membership arises mid-term under the situations set out in paragraphs 2 and 3 above. In a GC, this results in a by-election for a single seat, which is filled through the first-past-the-post voting system.

Vacancies in the membership of LegCo in January 2010

5. On 25 January 2010, a Member from each of the five GCs submitted written notice of resignation to the Clerk to LegCo. Pursuant to section 35 of LCO, the Clerk to LegCo 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. Section 36(1)(a) of LCO further stipulates that the Electoral Affairs Commission ("EAC") must, in accordance with regulations in force under the EAC Ordinance (Cap. 541), arrange for a by-election to be held when the Clerk to LegCo makes a declaration as to the existence of a vacancy in the membership of LegCo.

6. In accordance with section 16 of LCO, a person who ceases to be a Member is, subject to section 39 (When person is disqualified from being nominated as a candidate and from being elected as a Member), eligible for re-election as a Member. The resignation of the five Members took effect on 29 January 2010. EAC conducted a by-election on 16 May 2010 to fill the five vacancies and the five resigned Members were all re-elected.

Object of the Bill

7. The object of the Legislative Council (Amendment) Bill 2011 ("the Bill") is to provide for the filling of any vacancy in the membership of LegCo arising during the term of office of LegCo in any GC or the District Council (second) functional constituency ("DC (second) FC") by a replacement mechanism in certain circumstances and to make related amendments to the Electronic Transactions (Exclusion) Order.

The Bills Committee

8. At the House Committee meeting on 10 June 2011, members formed a bills committee to study the Bill. Mr TAM Yiu-chung and Mr Jeffrey LAM were elected as Chairman and Deputy Chairman of the Bills Committee respectively. The Bills Committee had 39 members at its inception. Twelve members belonging to the pan-democratic camp withdrew with effect from 22 June 2011. The membership list of the Bills Committee is in the **Appendix**.

9. The Bills Committee held a total of nine meetings from 17 June 2011 to 3 February 2012. The Panel on Constitutional Affairs held a special meeting on 18 June 2011 to receive submissions from 134 organizations and individuals on the proposed replacement mechanism and the Bill. Members of the Bills Committee were invited to the meeting.

Deliberations of the Bills Committee

Urgency for enactment of the Bill and commencement dates (Clause 1)

10. Under Clause 1(3) of the Bill, sections 1, 2 and 7 of the Legislative Council (Amendment) Ordinance 2011 (which relates to the compilation and publication of a precedence list) shall come into operation on 1 September 2012. For the remaining provisions of the Ordinance, they will come into operation on the commencement of the term of office of the Fifth LegCo in 2012. The Administration explained that the aim of these remaining provisions was to introduce the proposed replacement mechanism for filling a vacancy in the membership of LegCo starting from the Fifth LegCo on 1 October 2012.

11. According to the Administration, there was an urgency for the Bill to be enacted within the current legislative session in order to provide sufficient notice for potential candidates to consider whether to stand for the upcoming DC election to be held on 6 November 2011 and to organize publicity to help electors understand the arrangements for the LegCo election next year. The 17% voter turnout rate for the 2010 LegCo by-election had clearly reflected that many members of the public did not accept that Members could resign at will to instigate the so-called "referendum". The Administration further explained that although the Bill provided for the new electoral arrangements for the Fifth LegCo, time should be given for electors to understand the effect of their votes to be cast in the LegCo election in September 2012. Apart from electing Members, these votes would collectively have the effect of identifying candidates for filling vacancies under the replacement mechanism. Also, persons who wished to consider standing in the DC election in November 2011 would 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. The Administration hoped to have a year's time for undertaking public education and publicity on the replacement mechanism so as to inform electors that in the LegCo election next year, their votes would carry the dual-effect of voting Members into office and forming the precedence list of candidates as replacements for filling vacancies arising in GCs and DC (second) FC during the term of the Fifth LegCo.

12. Members belonging to the pan-democratic camp expressed strong objection to the Administration's attempt to rush through the Bill within a very short period of time. They pointed out that the Administration announced its proposal for introducing the replacement mechanism only on 17 May 2011, but introduced the Bill into LegCo on 8 June 2011. These members were of the view that the Bill had proposed a fundamental change which would have significant impact on the existing election system. The proposed replacement mechanism would distort the will of the electorate, and deprive the public of their right to stand for and to vote in a by-election. They were very dissatisfied that the Administration had not conducted any public consultation on the Bill before its introduction into LegCo. Mr Alan LEONG stressed that the Administration could not deprive electors of their right to vote in a by-election simply on the ground of a low turn-out for the 2010 LegCo by-election. Moreover, even though the public might agree with the introduction of the proposed replacement mechanism for filling a vacancy arising from resignation of Members, it did not necessarily mean that they agreed with the application of the proposed mechanism to other situations such as death of a Member. These members stressed the need to allow more time for debate within the community and due scrutiny by LegCo. As the election for the constitution of the Fifth LegCo would not be held until September 2012, they questioned the need to enact the Bill by the end of the current legislative session. These members found the Administration's arrangement totally unacceptable.

13. Some other members, however, welcomed the Administration's move to put forward the proposed replacement mechanism which, they considered, could prevent the existing replacement arrangement from being abused in the future. These members expressed strong dissatisfaction that the five Members had resigned at will in January 2010 to force a so-called "referendum", incurring \$126 million public resources for the conduct of the by-election, and their move affected adversely the smooth operation of LegCo and the work of other Members. These members were concerned that a DC (second) FC Member to be returned from the whole HKSAR as a single constituency could by means of his resignation alone easily set in motion a by-election for political purposes. They pointed out that some overseas jurisdictions adopted a replacement mechanism

based on the result of the previous general election instead of holding by-elections. They also noted that the issue had been fully discussed by Members and debated in the community for quite some time. These members accepted the Administration's explanation on the need for early enactment of the Bill. However, they stressed that the Administration should enhance its effort in undertaking public education and publicity on the justification for introducing the proposed replacement mechanism and its arrangements.

14. Dr Margaret NG moved a motion at the meeting of the Bills Committee on 22 June 2011 requesting the Administration to withdraw the Bill until after a comprehensive public consultation had been conducted. The motion was negated. The 12 members belonging to the pan-democratic camp then withdrew from the Bills Committee.

Conformity with the Basic Law

15. Members noted with concern the views of the Hong Kong Bar Association ("the Bar Association")'s views about the non-conformity of the Bill with BL 26 and BL 68. According to the Bar Association, a Member returned through the proposed replacement mechanism was not "elected" within the meaning of "election" in BL 68 because the mechanism could not express and give effect to the free will of the electors. The proposed replacement mechanism in its present form was contrary to BL, the Hong Kong Bill of Rights ("HKBOR") and the International Covenant on Civil and Political Rights. Furthermore, it represented an unwarranted and unjustified attempt to deprive Hong Kong citizens of their right to vote and their right to stand for election in the event of a vacancy arising in LegCo in the future.

16. Members belonging to the pan-democratic camp shared the concern of the Bar Association. Ms Cyd HO and Mr Alan LEONG considered that there was simply no way for the electors at the time of voting at a general election to know how to vote for the replacement candidates. As there were too many uncertain factors during the period between a general election and the time when a vacancy arose, their preference for candidates might be different because of changes in political and social circumstances, or subsequent behaviour of the candidates concerned. Ms HO further pointed out that in accordance with the current section 46A of LCO, the Returning Officer ("RO") must declare that the proceedings for the election for the constituency were terminated if proof was given to his satisfaction that a validly nominated candidate for election for a constituency had died or was disqualified from being elected. She considered that electors should be given the opportunity to vote for a candidate at a by-election when a vacancy

arose mid-term so that they could exercise their votes according to the prevailing circumstances.

17. At the request of the Bills Committee, the Administration had made the following responses to the views of the Bar Association -

- (a) neither BL nor HKBOR required that any casual vacancy must be filled by means of a by-election. Nor did they mandate that a vacancy be filled by any particular method. There were other electoral systems where casual vacancies were filled by reference to votes cast in the previous general election instead of holding a by-election². Because by-election was not a must, one could not conclude that not using by-election to fill casual vacancies was tantamount to an unconstitutional deprivation of the right to vote or the right to stand for election;
- (b) the Government and the Legislature were entitled to take into account the event which took place in 2010 when certain Members resigned from office in order to trigger a by-election in which the Members intended to stand and seek re-election. It was 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:
 - (i) the constituents were deprived of representation during the period between the resignation and the by-election;
 - (ii) a record low voter turnout rate for the 2010 by-election indicating that the resignation action lacked general public support; and
 - (iii) the high cost of holding such by-election would be a strain on the public funds;
- (c) under the proposed method, the votes originally cast in the previous general election in favour of the out-going Member had been "used" or "spent". The replacement mechanism was 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 gave effect to the free expression of the will of the electors in the previous general election as a whole

² For example, Germany, Finland, Poland, Australian Capital Territory and Tasmania.

and in line with the spirit of the proportional representation system. The candidate selected to fill the casual vacancy in this way was still chosen by reference to the result of the previous general election. Accordingly, even with the replacement mechanism introduced, LegCo would continue to be "constituted by election" under BL 68;

- (d) the replacement mechanism directly addressed the mischief as mentioned in sub-paragraph (b) above, which was a legitimate consideration by way of justification, and a proportionate response;
- (e) the right of permanent residents who were registered electors to vote and to stand for election in general elections was in no way affected by the proposed replacement mechanism. Rules for the replacement mechanism would be in place for electors and candidates to follow at the time of the general election. The proposal was therefore consistent with Article 21(b)³ of HKBOR and BL 26; and
- (f) different jurisdictions were accorded a wide margin of appreciation in managing their electoral affairs and in stipulating conditions for the exercise of electoral rights. The Bill had been introduced by the HKSAR Government and it was for LegCo to consider whether it was to be passed into law. BL 68 and Annex II to BL gave LegCo a broad discretion in determining the contents of legislation which governed the "specific method" for forming LegCo. The proposed replacement mechanism was a solution within the discretionary area of judgment of the Legislature. The introduction of the Bill was consistent with Annex II to BL.

Operation of the proposed replacement mechanism (Clauses 4 to 6 and clauses 14 to 15)

18. According to the proposed section 35A, if the office of a Member returned for any GC or DC (second) FC becomes vacant otherwise than within four months preceding the end of LegCo's current term of office, and there is a precedence list for that constituency, the RO appointed for the constituency concerned must deliver a notice to the person who ranks highest on the precedence list for the constituency concerned. A person to whom a notice is so delivered may, within seven 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 RO. If the RO receives a confirmation from the person and determines,

³ According to the Article, every permanent resident shall have the right and opportunity to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

upon an inquiry, that the person is eligible to become a Member, the RO must, as soon as practicable, publicly declare that the person becomes a Member, and upon the declaration, the person becomes a Member. If a vacancy in the membership of LegCo is not filled by a person to whom a notice is so delivered as the person does not accept the seat or the person is not eligible, the precedence list for the constituency concerned is revised by removing the name of the person from the list. The RO must notify the person who ranks next highest on the list. If necessary, the RO must repeat the process until the vacancy is filled.

19. Mr LAU Kong-wah asked about the scope of the inquiry which would be conducted by the RO. The Administration explained that the RO would need to ascertain from the person who ranked highest in the precedence list as to whether that person was eligible to become a Member under the proposed section 35A(6). The RO would make the inquiry in a form to be specified.

20. According to the Administration, a person who became a Member under the proposed replacement mechanism was to be regarded as a Member elected as such, and the process through which the person became a Member was to be regarded as part of an election. If the persons on the precedence lists were exhausted and the vacancy could not be filled by the operation of the replacement mechanism, the RO must publicly declare that the vacancy was not filled by publishing the declaration in the Gazette and a by-election would be held.

21. Members belonging to the pan-democratic camp criticized that the proposed replacement mechanism would go against the principle of the proportional representation system and distort the will of the electorate as the vacant seat left by the resigned Member might be filled by another candidate of different political affiliations. They pointed out that the proportion of seats under the proportional representation election system would be changed as a result. Ms Emily LAU stressed that there was no similar arrangement in overseas jurisdictions where a vacancy would be filled by a candidate on a different list with the highest remainder votes (i.e. votes that were not enough to enable the candidate to be returned at the preceding general election). Mr Alan LEONG pointed out that while casual vacancies were filled by reference to votes cast in the previous general election instead of holding a by-election in Tasmania, the "single transferable vote" method was adopted for the Tasmanian House of Assembly elections.

22. Ms LI Fung-ying was of the view that when a Member who represented his list of candidates had to leave the office or chose to resign, it was reasonable that the vacant seat should be filled by the next candidate on the same list. She

requested the Administration to explain the rationale for not adopting such an arrangement.

23. The Administration explained that the proposed replacement mechanism was put forward to plug a loophole in the existing replacement arrangement under which a Member could resign to force a by-election and stand for that by-election. The proposal for not filling a vacancy with a candidate from the same list as that resigned Member was to avoid a Member handing over his seat to a successor of the same affiliation. The Administration stressed that the proposal had taken into account the Hong Kong situation and should be adequate to plug the loophole.

24. Dr Margaret NG criticized the Administration for creating unfairness by not applying the proposed replacement mechanism to traditional FCs and allowing electors in these FCs to vote for their representatives in a by-election should a vacancy arise.

25. The Administration explained to the Bills Committee that similar to GCs, 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) would stand for election for the new seats would be adopted. As the voting arrangements for the DC (second) FC would be similar to that for GCs, the replacement arrangement for GCs could also apply to a vacancy for the DC (second) FC. The Administration further explained that it would not be appropriate to fill a vacancy arising in traditional FCs by a candidate who had lost in a general election under the first-past-the-post system which was adopted for traditional FCs. This would not reflect the overall will of the electorate, as in the case of a proportional representation system. The existing arrangement for replacing vacancies in traditional FCs through by-elections had been operating well and was generally accepted by the public.

26. To enhance clarity of the relevant provisions, the Administration agreed to move a CSA to amend the proposed section 35A(8)(b) as follows -

"(b) the process through which the person becomes a Member under this section is to be regarded as part of an election, ...".

In the light of members' comments on whether the arrangements concerning the precedence list should be regarded as part of the election, the Administration further agreed to move a CSA to amend the proposed section 35A(8)(b) as follows -

"(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, ...".

27. The Administration explained that under the proposed section 58A, the RO must, as soon as practicable after the completion of the counting of votes, compile a precedence list and publish the list by notice in the Gazette. A precedence list would only be compiled based on the votes in the general election, and as such, the arrangements concerning the list should be regarded as a part of the result of the relevant election.

Scope of the replacement mechanism

28. The Administration proposed that the replacement mechanism should cover situations encompassed by section 15 of LCO and BL 79. Some members including Ms Miriam LAU, Ms LI Fung-ying, Dr Priscilla LEUNG, Mr CHAN Kin-por, Mr WONG Kwok-kin and Mrs Regina IP had reservations about the scope of the proposed replacement mechanism being too wide as to cover all situations where a vacancy arose mid-term. These members pointed out that some situations as set out in section 15 of LCO (i.e. death of a Member) and in BL 79 (i.e. a Member losing the ability to discharge his duties as a result of serious illness or other reasons) were outside the control of the Member, and considered that the scope of the proposed replacement mechanism should exclude those situations. They requested the Administration to elaborate on the rationale for the proposed replacement mechanism to cover all situations encompassed by section 15 of LCO and BL79.

29. The Administration advised that firstly, it was necessary to plug the loophole whereby Members could resign at will, give rise to unnecessary by-elections, and which, in turn, would lead to unnecessary public expenditure. Secondly, it was necessary to forestall situations whereby a certain Member could make use of the provisions of BL 79 to bring about a situation that required the President of LegCo to declare that the Member concerned was no longer qualified for the office. There were certain possibilities that the Member could take such an initiative. For example, under BL 79(2), the Member could choose to be absent from Council meetings with no valid reason and without the consent of the President. Under BL 79(3), the Member could renounce his status as a permanent resident of HKSAR. Under BL 79(7), the Member could choose to misbehave, with the result that two-thirds of the Members of the Council present passed a motion of censure. Thirdly, the Member could become bankrupt or fail to comply with a court order to repay debts, or was convicted and sentenced to imprisonment for one month or more for a criminal offence and relieved of

his/her duties by a motion passed by two-thirds of the Members of the Council present. Under BL 79(5) and BL 79(6) respectively, the President shall declare that the Member was no longer qualified for the office. In these circumstances, the Member had a degree of personal responsibility. Also, the Member could accept an appointment as public servant under BL 79(4).

30. The Administration further explained that since a Member had control or carried a degree of personal responsibility, it was appropriate to apply the replacement mechanism to any vacancies arising in these situations. As for a vacancy arising following the death of a Member, or where under BL 79(1), the Member lost the ability to discharge his duties as a Member due to serious illness or other reasons, the Member concerned might not have personal control of the situation. However, the Administration still considered it appropriate to apply the replacement mechanism to this situation, in the same manner as it was applied to the other situations outlined above. It was the Administration's firm view that the same replacement mechanism which determined the replacement candidates based on the list proportional representation voting system should fill vacancies arising in different situations. The Administration considered that such a mechanism would be more able to withstand a legal challenge in the court.

31. Mrs Regina IP suggested that the Administration should provide for a safety valve within the proposed replacement mechanism by, for example, giving discretionary power to the Chief Executive to order a by-election to be held to fill a vacancy under certain circumstances. It was the Administration's view that for the sake of maintaining checks and balances, it was not proper to give the discretion to the Executive in deciding whether a by-election should be held for the constitution of the Legislature. The Administration considered it more appropriate to leave the discretion to the Court.

32. Dr Priscilla LEUNG reiterated her suggestion that to plug the loophole in the existing replacement arrangement, Members who had resigned should be restricted from standing in any by-elections during the term of LegCo for a certain period. The Administration advised that after due consideration, it had decided not to pursue such an option because it might affect the right of the persons concerned to stand for election under BL 26.

33. Some members maintained the view that the proposed 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 had passed away or were unable to discharge their duties due to serious illness. This was because such Members did not leave their office intentionally or voluntarily,

and therefore should be differentiated from those resigning from office on their own initiative.

Compilation and publication of a precedence list
(Clause 7)

34. The proposed section 58A of the Bill provides for the compilation and publication of a precedence list as soon as practicable following the completion of the counting of votes for a GC or DC (second) FC by the RO. The precedence list is to consist of the names of -

- (a) the first candidate who has not yet been elected in any list of candidates having valid votes but has no candidate duly elected; and
- (b) the first candidate who has not yet been elected in any list of candidates which has any number of candidates elected and has remaining votes that did not return a candidate.

The list sets out candidates of LegCo GCs and the DC (second) FC who are eligible to fill the vacancy in a descending order determined by the number of remaining votes secured by the list of candidates in the general election. If two or more lists in a constituency get the same vote in the general election, the drawing of lots shall be done right after counting of votes so that the order of precedence can be determined.

35. Mr WONG Kwok-hing asked why the second candidates on the two lists in paragraph 34(a) and (b) above would not be included in the precedence list. The Administration confirmed that it would be more appropriate to include only the first candidate who was not returned at the preceding general election in each list of candidates which had remainder votes in the list.

36. Under the proposed section 58B(3) of the Bill, the names of the persons on the precedence list 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. Under the proposed section 58B(4)(a) of the Bill, a person who is a candidate from a list of candidates with candidates who are not duly elected is to be regarded as having the votes obtained by the list of candidates in which the name of the person appears. Under the proposed section 58B(4)(b) of the Bill, a person who is a candidate from a list of candidates with candidates elected is to be regarded as having the number of votes that is equal to the remaining number of votes obtained by the list of candidates in which the name of the person appears. Under the proposed section 58B(6) of the Bill and the new

proposed 58B(6A) (which was prescribed in the CSAs the Administration had agreed to move), if a precedence list published by the RO was revised because a person had become a Member, had died, or did not accept the seat, or the vacancy was not filled by the person who ranked highest on the precedence list to whom a notice was delivered, the RO must announce the revision and publish the list as revised.

37. Members belonging to the pan-democratic camp were of the strong view that having the first candidate who had not been elected in the list with the largest number of remainder votes to fill the vacancy would distort the proportional representation system as that candidate might be of a different political affiliation and this contravened the will of the electors expressed at the general election.

38. The Administration explained that the proposal had taken into account the situation in Hong Kong and was consistent with the proportional representation electoral system. This replacement mechanism could still reflect the overall will of the electorate expressed during the general election. In formulating a mechanism for filling a vacancy in LegCo arising from a Member resigning mid-term, the following aspects were pertinent for consideration –

- (a) electors in Hong Kong voted according to the political parties or groups which they wished to support. At the same time, they also cast their votes on the basis of the lists which had candidates who were more well-known. Hence, the number of votes obtained by a list of candidates to a significant extent hinged on the presence of individual well-known candidates. Thus, once a candidate had resigned, one could not 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 Member resigned, his votes should go with him as he had already used the quota of the votes to take up his seat; and
- (c) the political party system in Hong Kong was still evolving. In fact, political party politics in Hong Kong had not yet evolved to an extent that voters could choose between two or three major political parties in the general election.

39. Ms LI Fung-ying had reservations about the Administration's explanation, pointing out that it could not be assumed that electors cast their votes to the first candidate on the list, as they might cast their votes to the whole list (or the candidates on the same list as a team). She reiterated that to reflect the will of the

electors, it was more appropriate for the second candidate who had not been elected on the same list to fill the vacancy. Mr CHEUNG Man-kwong cautioned that the Administration had to consider carefully the political impact if it insisted on taking forward the proposal where there was a strong dissenting view in the community. He was of the view that if the vacancy was to be filled by the candidates on the same list of the Member who resigned might slightly ease public opposition.

40. Members noted that the first candidate not returned at the preceding general election in each list of candidates which had remainder votes would be included in the precedence list. Mrs Sophie LEUNG and Mr WONG Ting-kwong pointed out that a candidate would have his deposit being forfeited or would not be entitled to financial assistance if he had failed to obtain respectively 3% or 5% of the total number of valid votes cast for the GC concerned. They expressed concern that if many candidates in the precedence list were unable to take up the vacant seat for whatever reasons, a candidate who had obtained only a few votes (and had his deposit already forfeited) might be returned as Member. They requested the Administration to consider specifying a minimum threshold of valid votes for candidates to be included in the precedence list.

41. The Administration pointed out that according to past experience with the proportional representation list-voting system, amongst the candidates not elected in a GC, the candidates with the highest number of votes could obtain around 10 000 to 20 000 valid votes cast for the constituency. The upcoming elections for the GC and the five DC (second) FC seats were expected to be competitive. With the exception of the 2010 LegCo GC by-election, only two LegCo GC by-elections had been held since 1997. The Administration believed that the proposed replacement mechanism was adequate to plug the loophole in the existing replacement arrangement, and did not consider specifying a minimum threshold necessary.

Election petitions

(Clauses 8, 9 and 10)

42. Under Clause 8 of the Bill, an election petition may be lodged against the decision of a RO under the proposed section 58B as to whether to include the name of a person in a precedence list or the ranking of a person on that list on any of the grounds specified in the proposed section 61(2B). The grounds for such action include the following -

- (a) 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) 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) corrupt or illegal conduct was generally prevalent at or in connection with the relevant election; and
- (d) material irregularity occurred in relation to the relevant election, the polling or counting of votes at the relevant election, or the compilation of the precedence list.

43. Members noted that the Administration had proposed under Clause 10 of the Bill to add the proposed section 65(2) to specify that an election petition questioning a precedence list could be lodged only during the period of two months following the date of the publication of the list.

44. Mr LAU Kong-wah pointed out that a person could lodge an election petition on the ground that material irregularity occurred in relation to the relevant election, the polling or counting of votes at the relevant election or the compilation of the precedence list as specified in the proposed section 61(2B) when a vacancy in the LegCo membership arose mid-term (i.e. beyond the deadline for lodging an election petition). He was concerned as to whether a person could lodge an election petition against a person who became a Member through the proposed replacement mechanism after the prescribed period in accordance with the proposed section 65(2).

45. The Administration explained that as provided under the proposed section 65(2), the period within which an election petition questioning a precedence list could be lodged was two months following the date on which the list was published. However, there were separate provisions providing that an election petition could be lodged against a person in the precedence list who became a Member under the proposed sections 35A and 35B on the ground that the person was not eligible to become a Member. Such an election petition would be subject to the same two-month deadline for lodging petitions under section 65(1). Section 65(1) specified that an election petition questioning an election could be lodged only during the period of two months following the date on which the RO had published the result of the election in the Gazette.

46. The Administration further advised that under section 61(3), the "election" was defined as including nomination proceedings and the decisions of the RO. A decision of a RO under the proposed section 35A or 35B could be questioned only by an election petition lodged under section 62 on any grounds specified in section 61(1). Such an election petition would also be subject to the same two-month deadline for lodging petitions under section 65(1).

47. Mr LAU Kong-wah and Mr Jeffery LAM noted that one of the grounds under which a decision of a RO could be questioned was that material irregularity occurred in relation to the polling or counting of votes at the relevant election. As such, there might be a possibility that a recount of all the ballot papers for a constituency was required when an election petition was lodged on such ground. They requested the Administration to consider the need for keeping the ballot papers for a longer period after the counting, taking into account that the term of office of Members was four years.

48. The Administration advised that it was an established practice for the Registration and Electoral Office to destroy all ballot papers for elections six months after counting. In the light of members' concern, the Administration would discuss with EAC on whether the ballot papers should be kept for a longer time after counting.

Court's determination in relation to election petition

(Clause 11)

49. Clause 11 of the Bill proposes to add sections 67(2A) and 67(2B) to the effect 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, CFI must determine whether the name is to be included in the list, and at the end of the trial of an election petition that relates to the ranking of a person on a precedence list, CFI must determine whether the ranking of the person on the list is correct and, if not correct, what is the correct ranking.

50. The Administration had agreed to move CSAs to add subsections (2AA) and (2C) to section 67 to the effect that in determining an election petition that questioned a person's eligibility to become a Member under section 35A or 35B, CFI must determine whether the person was eligible to become a Member under that section, and in determining an election petition in which the validity of a precedence list published under section 58B was questioned due to a determination of CFI under section 67(2A) or (2B) in relation to any candidate on the list, CFI must determine whether the precedence list was valid.

51. In response to Dr Philip WONG's enquiry as to whether there was an avenue of appeal against the CFI's determination, the Administration informed members that as CFA had declared the finality provision in section 67(3) of LCO as unconstitutional and invalid, the Administration had proposed in the Electoral Legislation (Miscellaneous Amendments) Bill 2011 (the Second Reading debate on which was to be resumed at the Council meeting of 6 July 2011) that a leap-frog appeal mechanism would be introduced so that an appeal against CFI's determination could be made to CFA direct. As such, the Administration had agreed to move CSAs to amend section 70B of the principal Ordinance to give the powers for CFA to determine –

- (a) if the election petition questioned a person's eligibility to become a Member under section 35A or 35B, whether the person was eligible to become a Member under that section;
- (b) if the election petition related to the name of a person in, or the exclusion of the name of a person from a precedence list published under section 58B, whether the name was to be included in the list;
- (c) if the election petition related to the ranking of a person on a precedence list published under section 58B, whether the ranking of the person on the list was correct and if not correct, what was the correct ranking; and
- (d) if in the hearing the validity of a precedence list published under section 58B was questioned due to a determination of CFI under section 67(2A) or (2B) in relation to any candidate on the list, whether the list was valid.

52. Members noted that the Administration had agreed to move CSAs to add paragraphs (ba), (bb), (bc) and (bd) to the proposed section 58B to provide corresponding provisions so that after the determination of CFI or CFA under section 67 or section 70B, the precedence list should be revised in accordance with the determination of CFI or CFA.

53. According to the Administration, the proposed CSAs gave CFI and CFA the power to determine whether the precedence list was valid. In effect, by virtue of the proposed section 35A, in the absence of a valid precedence list where a vacancy arose, a by-election would be held in accordance with section 36. The authority to determine in the circumstances under section 36 whether a by-election would need to be held would rest with EAC.

54. Dr Priscilla LEUNG was of the view that the drafting of the proposed sections 67(2) and 70B(a)(ii) under which CFI and CFA must determine whether the precedence list was valid might give rise to possible judicial challenge on the proposed replacement mechanism. She pointed out that under the proposals in the Bill, a precedence list was compiled on the basis of the counting of votes for a GC or DC (second) FC by the RO. She considered the only scenario that the precedence list would be determined by the Court as invalid was where the relevant GC or DC (second) FC election had to be declared invalid. In her view, the proposed CSAs should make it clear that the Court was only empowered to determine whether a person was eligible to be included in the precedence list if the validity of the precedence list published under section 58B for the constituency was questioned.

55. The Administration advised that the purpose of the proposed amended sections 67 and 70B was to empower CFI or CFA to determine an election petition against a decision made by a RO as regards the compilation of a precedence list or the eligibility of a person on a precedence list to become a Member. To address members' concern, the Administration had undertaken to elaborate at the Second Reading debate on the Bill the legislative intent of and the inter-relation among the relevant provisions.

The revised replacement mechanism

56. The Administration advised the Bills Committee that after having given Members' views very close and careful consideration, the Government had concluded that the replacement mechanism should be revised as follows-

- (a) if any vacancy arose under section 15 of LCO or BL 79 (including those due to death, serious illness, resignation, or disqualification of Members due to other reasons), the vacancy would be filled by the candidate who was of the highest order of the priority among the candidate list of the Member who had resigned from or vacated his seat;
- (b) if the candidates remaining on the candidate list of the Member vacating his seat did not wish or were ineligible to fill the vacancy, or if there was no other candidate remaining on the candidate list, then the precedence list of candidates with the largest remaining votes would be used to fill the vacancy; and
- (c) if the vacancy could not be filled by sub-paragraph (a) and (b) above, a by-election will be held to fill the vacancy.

57. According to the Administration, the revised scheme could ensure that voters would know clearly that in the general election, their support for a particular list of candidates representing a particular political party or grouping could be retained for the four-year term. Moreover, the revised scheme would continue to ensure that -

- (a) if Members chose to resign, there would be no unnecessary by-elections;
- (b) Members who resigned would 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 would be no unnecessary public expenditure incurred; and
- (d) the smooth operation of LegCo and service to the public would be maintained to the largest extent possible.

58. The Administration explained that CSAs would be moved to add the new proposed section 35A in order to provide for the revised replacement mechanism as follows-

- (a) if any vacancy in the membership of the LegCo for any GC and DC (second) FC arose under section 15 of LCO (including those due to death, resignation, disqualification of Members due to other reasons or the situations set out in BL 79), the vacancy would be filled by the candidate who ranked highest amongst the candidates on the candidate list of the Member who had resigned from or vacated his seat;
- (b) the RO must deliver a notice to the candidate who ranked highest under the proposed section 35A(3);
- (c) under the proposed section 35A(4), a person to whom a notice was so delivered could, within seven days after the date on which the notice was delivered, signify his or her acceptance of office as a Member by a written confirmation sent to the RO;
- (d) under the proposed section 35A(5), if the RO received a confirmation from the person and determined, upon an inquiry, that the person was eligible to become a Member, the RO must, as soon

as practicable, publicly declare that the person became a Member and upon the declaration the person became a Member;

- (e) under the proposed section 35A(7), if the vacancy was not filled by a person to whom a notice was delivered and there was at least one other person on the relevant list of candidates who was eligible, the RO should deliver the notice to the candidate who ranked second highest on the list; and
- (f) under the proposed section 35A(9), if a vacancy in the membership of LegCo was not filled under the proposed section 35A, the RO must publicly declare that the vacancy was not filled under this section.

59. The Administration further explained that the original section 35A was now renumbered as section 35B. A CSA would be moved to amend the proposed section 35B to provide that a vacancy would be filled by the operation of the precedence list, if the vacancy was not filled under the proposed section 35A.

60. The Bills Committee held a meeting on 4 July 2011 to receive a briefing from the Administration on the proposed revised replacement mechanism and the related CSAs. While some members expressed support for the revised replacement mechanism, some other members expressed the views that (a) the resigning Member should be restricted from participating in any by-election in the entire remainder of the term; (b) the vacancy concerned should be filled by a candidate on the same list as that of the resigning Member and if the vacancy could not be filled by candidate(s) from the same list, a by-election should be held; and (c) the proposed replacement mechanism should not apply to causal vacancies arising from death, serious illness or other involuntary circumstances. There was a call on the Administration to provide more time to consider members' views and make use of the summer recess to conduct a public consultation exercise on relevant issues.

Withdrawal of notice to resume Second Reading debate on the Bill on 13 July 2011

61. The Chairman of the Bills Committee made a verbal report on the deliberations of the Bills Committee at the House Committee meeting on 24 June 2011, indicating that subject to the CSAs to be moved by the Administration, the Bills Committee raised no objection to the resumption of the Second Reading debate on the Bill at the Council meeting of 13 July 2011.

62. The Administration wrote to the Clerk to LegCo on 4 July 2011 advising that in response to the views of the Bills Committee that the Administration should provide more time to consider members' suggestions and listen to the views of the public, the Administration had decided not to resume the Second Reading debate on the Bill at the Council meeting of 13 July 2011 and withdrew the notice given accordingly.

Public consultation on arrangements for filling vacancies in LegCo

63. On 22 July 2011, the Administration released a Consultation Paper on Arrangements for Filling Vacancies in the Legislative Council for public consultation until 24 September 2011. The Bills Committee held a meeting on the same day to receive a briefing by the Administration on the Consultation Paper.

64. On 20 January 2012, the Administration published the Consultation Report on Arrangements for Filling Vacancies in the Legislative Council. It is the Administration's latest proposal that -

- (a) a vacancy arising mid-term in a GC, the DC (second) FC or any other FC under section 15 or section 72 of LCO or BL79 would continue to be filled by a by-election;
- (b) a Member returned by a GC, the DC (second) FC or other FCs who has voluntarily resigned from office under section 13 or section 14 of LCO would be prohibited from standing in any by-elections in all GCs, the DC (second) FC and other FCs in the same LegCo term within six months of his resignation; and
- (c) the restriction would not apply to general elections. If the six-month prohibition spans over a current term and the following term of LegCo, the prohibition will not be applicable to the by-elections in the following term of LegCo.

65. The Administration briefed the Panel on Constitutional Affairs on the Consultation Report and its latest proposal at the special Panel meeting on 31 January 2012. Members of the Bills Committee were invited to attend the special meeting. Members have noted the Administration's plan to introduce a new bill to implement the latest proposal.

Withdrawal of the Bill

66. On 1 February 2012, the Secretary for Constitutional and Mainland Affairs wrote to the Chairman of the Bills Committee confirming that a new bill would be introduced, and that the Bill would not be further pursued and would be withdrawn. The Bills Committee held a meeting on 3 February 2012 to discuss its scrutiny work. The Bills Committee has agreed that in view of the Administration's decision to withdraw the Bill, there would be no need for the Bills Committee to continue its work. The Bills Committee reported accordingly to the House Committee on 10 February 2012.

Consultation with the House Committee

67. The Bills Committee reported on its deliberations to the House Committee on 24 June 2011 and 10 February 2012 respectively.

Council Business Division 2
Legislative Council Secretariat
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