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Paper for the House Committee

**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 have withdrawn with effective from 22 June 2011. The membership list of the Bills Committee is in **Appendix I**.

9. The Bills Committee has held a total of seven meetings to study the Bill. 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.

Deliberation of the Bills Committee

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

10. Under Clause 1(3) of the Bill², 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 has explained that the aim of these remaining provisions is 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 is 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 has 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 has further explained that although the Bill provides 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 wish to consider

² The Administration will move a Committee Stage amendment to amend Clause 1 of the Bill to the effect that the Legislative Council (Amendment) Ordinance 2011 comes into operation on 1 September 2012 (please refer to paragraph 43).

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 hopes 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 have expressed strong objection to the Administration's attempt to rush through the Bill within a very short period of time. They have 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 are of the view that the Bill has 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 are very dissatisfied that the Administration has not conducted any public consultation on the Bill before its introduction into LegCo. Mr Alan LEONG has 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 may agree with the introduction of the proposed replacement mechanism for filling a vacancy arising from resignation of Members, it does not necessarily mean that they agree with the application of the proposed mechanism to other situations such as death of a Member. These members have 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 have questioned the need to enact the Bill by the end of the current legislative session. These members find the Administration's arrangement totally unacceptable.

13. Some other members, however, welcome the Administration's move to put forward the proposed replacement mechanism which, they consider, can prevent the existing replacement arrangement from being abused in the future. These members have 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 are concerned that a DC (second) FC Member to be returned from the whole HKSAR as a single constituency can by means of his resignation alone easily set in motion a by-election for political purposes. They

have pointed out that some overseas jurisdictions adopt a replacement mechanism based on the result of the previous general election instead of holding by-elections. They also note that the issue has been fully discussed by Members and debated in the community for quite some time. These members accept the Administration's explanation on the need for early enactment of the Bill. However, they stress 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 note 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 is not "elected" within the meaning of "election" in BL 68 because the mechanism cannot express and give effect to the free will of the electors. The proposed replacement mechanism in its present form is contrary to BL, the Hong Kong Bill of Rights ("HKBOR") and the International Covenant on Civil and Political Rights. Furthermore, it represents 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 share the concern of the Bar Association. Ms Cyd HO and Mr Alan LEONG consider that there is 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 are too many uncertain factors during the period between a general election and the time when a vacancy arises, their preference for candidates may be different because of changes in political and social circumstances, or subsequent behaviour of the candidates concerned. Ms HO has 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 are terminated if proof is given to his satisfaction that a validly nominated candidate for election for a constituency has died or is disqualified from being elected. She considers that electors should be given the opportunity to vote for a candidate at a by-election when a vacancy arises

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

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

- (a) neither BL nor HKBOR 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;
- (b) the Government and the Legislature are 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 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:
 - (i) the constituents are 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 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

³ 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 is still chosen by reference to the result of the previous general election. Accordingly, even with the replacement mechanism introduced, LegCo will continue to be "constituted by election" under BL 68;

- (d) the replacement mechanism directly addresses the mischief as mentioned in sub-paragraph (b) above, which is a legitimate consideration by way of justification, and a proportionate response;
- (e) 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. Rules for the replacement mechanism would be in place for electors and candidates to follow at the time of the general election. The proposal is therefore consistent with Article 21(b)⁴ of HKBOR and BL 26; and
- (f) 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 Bill has been introduced by the HKSAR Government and it is for LegCo to consider whether it is to be passed into law. BL 68 and Annex II to BL gives LegCo a broad discretion in determining the contents of legislation which governs the "specific method" for forming LegCo. 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 to BL.

Operation of the proposed replacement mechanism

(Clauses 4 to 6 and clauses 14 to 15)

18. According to the proposed section 35A (now proposed section 35B following the introduction of the Committee Stage amendments ("CSAs") by the Administration), 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

⁴ 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.

Member by a written confirmation sent to the RO. If the RO receives a confirmation from the person and determines, 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 has asked about the scope of the inquiry which will be conducted by the RO. The Administration has explained that the RO will need to ascertain from the person who ranks highest in the precedence list as to whether that person is eligible to become a Member under the proposed section 35A(6) (now proposed section 35B(6)). The RO will make the inquiry in a form to be specified.

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

21. Members belonging to the pan-democratic camp have criticized that the proposed replacement mechanism will 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 may be filled by another candidate of different political affiliations. They have pointed out that the proportion of seats under the proportional representation election system will be changed as a result. Ms Emily LAU has stressed that there is no similar arrangement in overseas jurisdictions where a vacancy will 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 has pointed out that while casual vacancies are filled by reference to votes cast in the previous general election instead of holding a by-election in Tasmania, the "single transferable vote" method is adopted for the Tasmanian House of Assembly elections.

22. Ms LI Fung-ying is of the view that when a Member who represents his list of candidates has to leave the office or chooses to resign, it is reasonable that the

vacant seat should be filled by the next candidate on the same list. She has requested the Administration to explain the rationale for not adopting such any arrangement.

23. The Administration has explained that the proposed replacement mechanism is 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 is to avoid a Member handing over his seat to a successor of the same affiliation. The Administration stresses that the proposal has taken into account the Hong Kong situation and should be adequate to plug the loophole.

24. Dr Margaret NG has 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 has 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) will stand for election for the new seats will be adopted. As the voting arrangements for the DC (second) FC will be similar to that for GCs, the replacement arrangement for GCs may also apply to a vacancy for the DC (second) FC. The Administration has further explained that it will not be appropriate to fill a vacancy arising in traditional FCs by a candidate who has lost in a general election under the first-past-the-post system which is adopted for traditional FCs. This will 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 has been operating well and is generally accepted by the public.

26. To enhance clarity of the relevant provisions, the Administration has proposed to move a CSA to amend the proposed section 35A(8)(b) (now proposed section 35B(8)(b)) as follows (amendment underlined):

"(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 has

further proposed to move a CSA to amend the proposed section 35A(8)(b) (now proposed section 35B(8)(b)) as follows (further amendment underlined):

"(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 has explained that under the proposed section 58A (now proposed section 58B), 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 will 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 has 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 have reservations about the scope of the proposed replacement mechanism being too wide as to cover all situations where a vacancy arises mid-term. These members have pointed out that some situations as set out in section 15 of LCO (i.e. if a Member dies) and in BL 79 (i.e. when a Member loses the ability to discharge his duties as a result of serious illness or other reasons) are outside the control of the Member, and consider that the scope of the proposed replacement mechanism should exclude those situations. They have 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 has advised that firstly, it is necessary to plug the loophole whereby Members can resign at will, give rise to unnecessary by-elections, and which, in turn, will lead to unnecessary public expenditure. Secondly, it is necessary to forestall situations whereby a certain Member can make use of the provisions of BL 79 to bring about a situation that requires the President of LegCo to declare that the Member concerned is no longer qualified for the office. There are certain possibilities that the Member can take such an initiative. For example, under BL 79(2), the Member can choose to be absent from Council meetings with no valid reason and without the consent of the President. Under BL 79(3), the Member can renounce his status as a permanent resident of HKSAR. Under BL 79(7), the Member can choose to misbehave, with the result that two-thirds of the Members of the Council present pass a motion of

censure. Thirdly, the Member may become bankrupt or fail to comply with a court order to repay debts, or is 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 is no longer qualified for the office. In these circumstances, the Member has a degree of personal responsibility. Also, the Member can accept an appointment as public servant under BL 79(4).

30. The Administration has further explained that since a Member has control or carries a degree of personal responsibility, it is 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 loses the ability to discharge his duties as a Member due to serious illness or other reasons, the Member concerned may not have personal control of the situation. However, the Administration still considers it appropriate to apply the replacement mechanism to this situation, in the same manner as it is applied to the other situations outlined above. It is the Administration's firm view that the same replacement mechanism which determines the replacement candidates based on the list proportional representation voting system should fill vacancies arising in different situations. The Administration considers that such a mechanism will be more able to withstand a legal challenge in the court.

31. Mrs Regina IP has 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 is the Administration's view that for the sake of maintaining checks and balances, it is 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 considers it more appropriate to leave the discretion to the Court.

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

33. Some members maintain 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 have

passed away or are unable to discharge their duties due to serious illness. This is because such Members do 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 (now proposed section 58B) 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 has 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 has 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 has 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 is prescribed in the CSAs to be moved by the Administration), if a precedence list published by the RO is revised because a person has become a Member, has died, or does not accept the seat, or the vacancy is not filled by the person who ranks highest on the precedence list to whom a notice is delivered, the RO must announce the revision and publish the list as revised.

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

38. The Administration has explained that the proposal has taken into account the situation in Hong Kong and is consistent with the proportional representation electoral system. This replacement mechanism can 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 are pertinent for consideration –

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

39. Ms LI Fung-ying has reservations about the Administration's explanation, pointing out that it cannot be assumed that electors cast their votes to the first

candidate on the list, as they may cast their votes to the whole list (or the candidates on the same list as a team). She has reiterated that to reflect the will of the electors, it is more appropriate for the second candidate who has not been elected on the same list to fill the vacancy. Mr CHEUNG Man-kwong has cautioned that the Administration has to consider carefully the political impact if it insists on taking forward the proposal where there is a strong dissenting view in the community. He is of the view that if the vacancy is to be filled by the candidates on the same list of the Member who resigned may slightly ease public opposition.

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

41. The Administration has 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 are 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 believes that the proposed replacement mechanism is adequate to plug the loophole in the existing replacement arrangement, and does not consider specifying a minimum threshold necessary.

42. Members note that the Administration will move CSAs to further specify that the precedence list should also consist of the names of the persons determined by CFI or CFA that should be added on the list (proposed section 58B(6)(ba)) where the Court of First Instance ("CFI") or the Court of Final Appeal ("CFA") 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 in accordance with the determination on the number of valid votes received by that person (proposed section 58B(2)(c)).

43. Members also note that the Administration will move a CSA to amend the commencement clause in the Bill to the effect that all the sections come into operation on 1 September 2012. According to the Administration, the amendment is proposed to enable that after the LegCo general election in September 2012, a RO shall be able to compile a precedence list and that the decision of a RO 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.

Election petitions

(Clauses 8, 9 and 10)

44. 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.

45. Members note that the Administration has proposed under Clause 10 of the Bill to add the proposed section 65(2) (now proposed section 65(3)) to specify that an election petition questioning a precedence list may be lodged only during the period of two months following the date of the publication of the list.

46. Mr LAU Kong-wah has pointed out that a person may 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 arises mid-term (i.e. beyond the deadline for lodging an election petition). He is concerned as to whether a person can lodge an election petition against a person who becomes a Member through the proposed replacement mechanism after the prescribed period in accordance with the proposed section 65(2) (now proposed section 65(3)).

47. The Administration has explained that as provided under the proposed section 65(2) (now proposed section 65(3)), the period within which an election petition questioning a precedence list may be lodged is two months following the date on which the list is published. However, there are separate provisions (i.e. the proposed sections 61(1)(a)(ia) and 61(1)(a)(ib) as proposed in Clause 8 of the Bill and the CSAs to be moved by the Administration) providing that an election petition may be lodged against a person in the precedence list who becomes a Member under the proposed sections 35A and 35B on the ground that the person is not eligible to become a Member. Such an election petition will be subject to the same two-month deadline for lodging petitions under section 65(1). Section 65(1) specifies that an election petition questioning an election may be lodged only during the period of two months following the date on which the RO has published the result of the election in the Gazette. In the CSAs proposed by the Administration, the proposed section 35A(8)(b) states clearly that the process through which a person becomes a Member under the proposed section 35A is to be regarded as a part of the result of the relevant election. A RO who makes a declaration that the person becomes a Member must publish the declaration in the Gazette. As such, a person may act in accordance with section 65(1) and may lodge an election petition against a person in the precedence list who becomes a Member under the proposed section 35A.

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

49. Mr LAU Kong-wah and Mr Jeffery LAM note that one of the grounds under which a decision of a RO may be questioned is that material irregularity occurred in relation to the polling or counting of votes at the relevant election. As such, there may be a possibility that a recount of all the ballot papers for a constituency is required when an election petition is lodged on such ground. They have 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 is four years.

50. The Administration has advised that it is 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 will 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)

51. 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.

52. The Administration will move CSAs to add subsections (2AA) and (2C) to section 67 to the effect that in determining an election petition that questions a person's eligibility to become a Member under section 35A or 35B, CFI must determine whether the person is 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 is 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 is valid.

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

- (a) 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;

- (b) if the election petition relates 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 is to be included in the list;
- (c) if the election petition relates to the ranking of a person on a precedence list published under section 58B, whether the ranking of the person on the list is correct and if not correct, what is the correct ranking; and
- (d) if in the hearing the validity of a precedence list published under section 58B is questioned due to a determination of CFI under section 67(2A) or (2B) in relation to any candidate on the list, whether the list is valid.

54. Members note that the Administration will 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.

55. According to the Administration, the proposed CSAs give CFI and CFA the power to determine whether the precedence list is valid. In effect, by virtue of the proposed section 35A (now proposed section 35B), in the absence of a valid precedence list where a vacancy arises, a by-election will 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 will rest with EAC.

56. Dr Priscilla LEUNG is 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 is valid may give rise to possible judicial challenge on the proposed replacement mechanism. She has pointed out that under the proposals in the Bill, a precedence list is compiled on the basis of the counting of votes for a GC or DC (second) FC by the RO. She considers the only scenario that the precedence list will be determined by the Court as invalid is where the relevant GC or DC (second) FC election has to be declared invalid. In her view, the proposed CSAs should make it clear that the Court is only empowered to determine whether a person is eligible to be included in the precedence list if the validity of the precedence list published under section 58B for the constituency is questioned.

57. The Administration has advised that the purpose of the proposed amended sections 67 and 70B is 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 has 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

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

- (a) if any vacancy arises 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 will be filled by the candidate who is of the highest order of the priority among the candidate list of the Member who has resigned from or vacated his seat;
- (b) if the candidates remaining on the candidate list of the Member vacating his seat do not wish or are ineligible to fill the vacancy, or if there is no other candidate remaining on the candidate list, then the precedence list of candidates with the largest remaining votes will be used to fill the vacancy; and
- (c) if the vacancy cannot be filled by sub-paragraph (a) and (b) above, a by-election will be held to fill the vacancy.

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

- (a) if Members choose to resign, there will be no unnecessary by-elections;
- (b) Members who resign will 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 will be no unnecessary public expenditure incurred; and

- (d) the smooth operation of LegCo and service to the public will be maintained to the largest extent possible.

60. The Administration has explained that CSAs will 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 arises 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 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 RO 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 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;
- (d) under the proposed section 35A(5), if the RO receives a confirmation from the person and determines, 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;
- (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 RO should deliver the notice to the candidate who ranks second highest on the list; and
- (f) under the proposed section 35A(9), if a vacancy in the membership of LegCo is not filled under the proposed section 35A, the RO must publicly declare that the vacancy is not filled under this section.

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

62. The Bills Committee held a meeting on 4 July 2011 to receive a briefing from the Administration on the proposed revised replacement mechanism. Members have sought clarifications from the Administration on the proposed mechanism and the Administration has explained the operation accordingly. Ms Miriam LAU has requested the Administration to consider moving CSAs to achieve the effect that the proposed replacement mechanism be applied only to section 15(1)(a) of LCO where a Member resigns or is taken to have resigned from his office. Ms LAU has indicated that she will consider moving these CSAs if the Administration refuses to do so. The Administration has undertaken to consider her request.

Committee Stage amendments

63. Apart from the CSAs to be moved by the Administration as elaborated in the paragraphs 26, 42, 43, 47, 52, 53, 54, 55 and 60 above, at the suggestion of the Bills Committee, the Administration will introduce various CSAs to improve the drafting of the Bill. A full set of the CSAs to the Bill to be moved by the Administration are in **Appendix II**. The Bills Committee raises no objection to these CSAs.

Resumption of Second Reading debate on the Bill

64. The Bills Committee raises no objection to the resumption of the Second Reading debate on the Bill at the Council meeting of 13 July 2011, subject to the CSAs to be moved by the Administration.

Advice sought

65. Members are invited to note the deliberations of the Bills Committee.

Council Business Division 2
Legislative Council Secretariat
4 July 2011

Bills Committee on Legislative Council (Amendment) Bill 2011

Membership list

Chairman Hon TAM Yiu-chung, GBS, JP

Deputy Chairman Hon Jeffrey LAM Kin-fung, GBS, JP

Members Hon Albert HO Chun-yan (up to 22 June 2011)
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Dr Hon Margaret NG (up to 22 June 2011)
Hon CHEUNG Man-kwong (up to 22 June 2011)
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Dr Hon Philip WONG Yu-hong, GBS
Hon WONG Yung-kan, SBS, JP
Hon LAU Kong-wah, JP
Hon LAU Wong-fat, GBM, GBS, JP (up to 20 June 2011)
Hon Miriam LAU Kin-ye, GBS, JP
Hon Emily LAU Wai-hing, JP (up to 22 June 2011)
Hon Timothy FOK Tsun-ting, GBS, JP (up to 21 June 2011)
Hon Abraham SHEK Lai-him, SBS, JP
Hon LI Fung-ying, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP (up to 22 June 2011)
Hon Vincent FANG Kang, SBS, JP
Hon WONG Kwok-hing, MH
Hon CHEUNG Hok-ming, GBS, JP
Hon WONG Ting-kwong, BBS, JP
Hon Ronny TONG Ka-wah, SC (up to 22 June 2011)
Hon CHIM Pui-chung
Prof Hon Patrick LAU Sau-shing, SBS, JP
Hon Cyd HO Sau-lan (up to 22 June 2011)
Dr Hon LAM Tai-fai, BBS, JP
Hon CHAN Kin-por, JP
Dr Hon Priscilla LEUNG Mei-fun, JP
Hon WONG Kwok-kin, BBS
Hon IP Wai-ming, MH
Hon IP Kwok-him, GBS, JP
Hon Mrs Regina IP LAU Suk-ye, GBS, JP
Dr Hon PAN Pey-chyou
Hon Paul TSE Wai-chun, JP

Hon Alan LEONG Kah-kit, SC (up to 22 June 2011)
Hon LEUNG Kwok-hung (up to 22 June 2011)
Hon Tanya CHAN (up to 22 June 2011)
Hon Albert CHAN Wai-yip (up to 22 June 2011)
Hon WONG Yuk-man (up to 22 June 2011)

Total : 25 Members

Clerk

Miss Flora TAI

Legal Adviser

Mr Arthur CHEUNG

Date

4 July 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 falls 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)(iv) 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)(iv) 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)(v) 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—

“(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 section 67(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)”.

《 2011 年立法會(修訂)條例草案 》

委員會審議階段

由政制及內地事務局局長動議的修正案

條次

建議修正案

- 1 刪去第(2)及(3)款而代以 —
- “(2) 本條例自 2012 年 9 月 1 日起實施。”。
- 3 (a) 在建議的第 12(3)條中，刪去“13 及 15 條另有規定外，根據第 35A 條”而代以“15 條另有規定外，根據第 35A 或 35B 條”。
- (b) 在建議的第 12(3)(a)條中，刪去“35A(5)條”而代以“35A(5)或 35B(5)條(視屬何情況而定)”。
- 4(2) 在建議的第 13(5)條中，在“35A”之後加入“或 35B”。
- 5 (a) 在標題中，在“**35A**”之後加入“**及 35B**”。
- (b) 將建議的第 35A 條重編為第 35B 條。
- (c) 在建議的第 35B 條之前加入 —
- “35A. 由同一候選人名單上的候選人填補地方選區及區議會(第二)功能界別的立法會議席空缺**
- (1) 如有以下情況，本條適用 —

- (a) 從任何地方選區或區議會(第二)功能界別選出的議員席位根據第 15 或 72 條懸空，而該席位並非在立法會現屆任期結束前的 4 個月內懸空；及
 - (b) 該議員透過某張候選人名單(**有關候選人名單**)當選為地方選區或區議會(第二)功能界別的議員，而在該候選人名單上有最少一名符合以下說明的人士 —
 - (i) 在有關換屆選舉中沒有妥為當選為議員；
 - (ii) 仍然在世；
 - (iii) 在當其時並非議員；及
 - (iv) 在立法會現屆任期期間，不曾根據本條成為議員。
- (2) 如立法會秘書根據第 35 條，宣布立法會任何地方選區或區議會(第二)功能界別的議席出現空缺，為有關選區或選舉界別委任的選舉主任須就該空缺遵守第(3)款。
- (3) 選舉主任須將一份通知 —
- (a) (如在有關候選人名單上，只有一名人士符合第(1)(b)(i)、(ii)、(iii)及(iv)款說明)交付該人；
 - (b) (如在有關候選人名單上，有多於一名人士符合第(1)(b)(i)、(ii)、(iii)及(iv)款說明)交付該等人士當中在該名單上排名最前的人。

(4) 根據第(3)款獲交付通知的人，可在該通知交付當日後 7 日內，藉著向選舉主任送交書面確認，表明接受議員席位。

(5) 如選舉主任 —

(a) 按照第(4)款收到某人的確認；及

(b) 在進行查訊後，斷定該人有資格成為議員，

則選舉主任須在切實可行範圍內，盡快公開宣布該人當選為議員，而該項宣布一經作出，該人即成為議員。

(6) 就第(5)款而言，任何人如 —

(a) 並非屬第 39(1)條(a)、(b)、(c)、(g)、(h)或(i)段所指的人；

(b) 在該人根據第(4)款送交有關確認當日，並非正因服刑而受監禁；

(c) (假使在(b)段提述的日期當日，有就有關選區或選舉界別舉行的選舉)並非第 39(1)條(f)段所指的人；

(d) 在對上一次就有關選區或選舉界別進行選舉後，並無以第 39(1)(e)條第(i)、(ii)、(iii)或(iv)節所列方式被定罪；及

(e) 並無根據《精神健康條例》(第 136 章)被裁斷為因精神上無行為能力而無能力處理及管理其財務及事務，

即有資格成為議員。

(7) 如一個立法會議席空缺沒有由根據第(3)款獲交付通知的人(**前者**)填補，而在有關候選人名單上，有最少另一名符合第(1)(b)(i)、(ii)、(iii)及(iv)款說明的人，則 —

(a) 在立法會現屆任期期間，前者就本條而言，須視為不在有關候選人名單上；及

(b) 選舉主任須就該空缺及有關候選人名單，遵守第(3)及(5)款。

(8) 為施行任何條例任何條文，如在顧及該條文的目的下，該條文的文意有所要求，則 —

(a) 根據第(5)款成為議員的人，須視為當選的議員；及

(b) 某人根據本條成為議員的程序須視為有關選舉的結果的一部分。

(9) 如本條適用的立法會議席空缺沒有藉施行本條上列各款而填補，則選舉主任須公開宣布，該空缺沒有根據本條填補。

(10) 選舉主任如根據第(5)或(9)款作出宣布，須在憲報刊登該項宣布。”。

(d) 刪去建議的第 35B 條的標題而代以 —

“35B. 藉遞補順位名單填補地方選區及區議會(第二)功能界別的立法會議席空缺”。

(e) 在建議的第 35B(1)(a)條中，在“15”之後加入“或 72”。

(f) 在建議的第 35B(1)(a)條中，刪去“及”。

(g) 在建議的第 35B(1)條中，加入 —

“(aa) 有關空缺沒有根據第 35A 條填補；及”。

(h) 在建議的第 35B(1)(b)條中，在“就”之前，加入“在不抵觸第 67(2C)或 70B(a)(vi)條的條文下，”。

(i) 刪去建議的第 35B(2)條而代以 —

“(2) 為有關選區或選舉界別委任的選舉主任須在根據第 35A(9)條就有關空缺作出宣布後，在切實可行範圍內，盡快就該空缺遵守第(3)款。”。

(j) 在建議的第 35B(5)條中，刪去“人成”而代以“人當選”。

(k) 刪去建議的第 35B(8)條而代以 —

“(8) 為施行任何條例任何條文，如在顧及該條文的目的下，該條文的文意有所要求，則 —

(a) 根據第(5)款成為議員的人，須視為當選的議員；及

(b) 某人根據本條成為議員的程序須視為有關選舉的結果的一部分。”。

(l) 在建議的第 35B(11)條中，刪去“58A”而代以“58B”。

6(1) 在“35A”之後加入“或 35B”。

6(2) 在建議的第 36(1)(aa)條中，刪去“35A”而代以“35B”。

7 (a) 在標題中，刪去“58A”而代以“58B”。

- (b) 刪去“58 條之後”而代以“59 條之前”。
- (c) 將建議的第 58A 條重編為第 58B 條。
- (d) 在建議的第 58B(1)條中，刪去在“界別委”之前的所有字句而代以 —
 - “(1) 如在換屆選舉中，為選出任何地方選區或區議會(第二)功能界別的議員而舉行的選舉屬有競逐選舉，就該選區或選舉”。
- (e) 在建議的第 58B(2)條中，刪去“第(1)款”而代以“本條”。
- (f) 在建議的第 58B(2)(a)(ii)條中，刪去“及”。
- (g) 在建議的第 58B(2)(b)條中，刪去句號而代以“；及”。
- (h) 在建議的第 58B(2)條中，加入 —
 - “(c) 凡 —
 - (i) 原訟法庭或終審法院裁定，名列某候選人名單的原本被宣布為妥為當選為議員的某人，並非妥為當選為議員；及
 - (ii) 該項裁定的唯一理由，是該候選人名單所得的有效票的數目，少於另一或其他候選人名單所得者，

有關人士為該人。”。
- (i) 在建議的第 58B(4)(b)條中，刪去句號而代以分號。
- (j) 在建議的第 58B(4)條中，加入 —

“(c) 就憑藉原訟法庭或終審法院的裁定而其姓名獲加入遞補順位名單的第(2)(c)款提述的候選人而言 —

(i) 如該候選人亦符合第(2)(a)(i)或(ii)款的描述，該候選人持有的票數，須參照(a)段斷定；或

(ii) 如該候選人亦符合第(2)(b)款的描述，該候選人持有的票數，須參照(b)段斷定，

而在如此斷定票數時，須顧及該項裁定。”。

(k) 在建議的第 58B(6)條中，刪去“第(1)款”而代以“本條”。

(l) 在建議的第 58B(6)(a)條，在“35A”之後加入“或 35B”。

(m) 在建議的第 58B(6)條中，加入 —

“(aa) 在名列該名單的某人憑藉原訟法庭或終審法院根據第 67 或 70B 條作出的裁定而成為議員的情況下，即予修訂，方式是從該名單刪除該人的姓名；”。

(n) 在建議的第 58B(6)(b)條中，刪去“及”。

(o) 在建議的第 58B(6)條中，加入 —

“(ba) 在原訟法庭或終審法院就某人作出第(2)(c)款所描述的裁定的情況下，即予修訂，方式是在第(3)、(4)及(5)款的規限下，在該名單加入該人的姓名；

- (bb) 在原訟法庭或終審法院根據第 67(2A)或 70B(a)(iv)條裁定沒有列入該名單的某人的姓名須列入該名單的情況下，即予修訂，方式是在第 (3)、(4)及(5)款的規限下，在該名單加入該姓名；
 - (bc) 在原訟法庭或終審法院根據第 67(2A)或 70B(a)(iv)條裁定列入該名單的某人的姓名不得列入該名單的情況下，即予修訂，方式是從該名單刪除該姓名；
 - (bd) 在原訟法庭或終審法院根據第 67(2B)或 70B(a)(v)條裁定某人在該名單上的某個排名屬正確的情況下，即予修訂(如有需要的話)，方式是反映該排名；及”。
 - (p) 在建議的第 58B(6)(c)條中，刪去“35A(7)(a)”而代以“35B(7)(a)”。
 - (q) 在建議的第 58B 條中，加入 —
 - “(6A) 如根據本條公布的遞補順位名單根據第(6)款或第 35B(7)條修訂，選舉主任須藉在憲報刊登的公告 —
 - (a) 宣布該項修訂；及
 - (b) 公布經修訂的該名單。”。
 - (r) 在建議的第 58B(7)條中，刪去“第(1)款公布的遞補順位名單所列的所有姓名，均已根據第(6)(a)或(b)款或第 35A(7)條”而代以“本條公布的遞補順位名單所列的所有姓名，均已根據第(6)款或第 35B(7)條”。
 - (s) 刪去建議的第 58B(8)及(9)條。
- 8(2) 在建議的第 61(1)(a)(ia)條之後，加入 —

- “(ib) (就根據第 35B 條成為議員的人而言)該人根據第 35B(6)條沒有資格成為議員；或”。
- 8(3) (a) 在建議的第 61(2A)條中，刪去“58A”而代以“58B”。
- (b) 在建議的第 61(2A)條中，在“由，”之後加入“並只”。
- 9 (a) 在建議的第 63(1A)(a)及(b)條中，刪去“58A”而代以“58B”。
- (b) 在建議的第 63(1B)條中，刪去“58A”而代以“58B”。
- 10 (a) 在標題中，刪去“**提交選舉呈請書**”而代以“**提出選舉呈請及上訴**”。
- (b) 刪去第(1)款。
- (c) 在第(2)款中，刪去“65(1)”而代以“65(2)”。
- (d) 在第(2)款中，將建議的第 65(2)條重編為第 65(3)條。
- (e) 在第(2)款中，在建議的第 65(3)(a)、(b)及(c)條中，刪去“58A”而代以“58B”。
- (f) 在第(2)款中，在中文文本中，在建議的第 65(3)條中，在“可於”之前加入“只”。
- 11 (a) 在建議的第 67(2A)條之前加入 —
- “(2AA) 如選舉呈請是質疑某人根據第 35A 或 35B 條成為議員的資格，則在該呈請的審訊完結時，原訟法庭須裁定該人是否有資格根據該條成為議員。”。
- (b) 在建議的第 67(2A)條中，刪去“58A”而代以“58B”。
- (c) 在建議的第 67(2B)條中，刪去“58A”而代以“58B”。

(d) 加入 —

“(2C) 如因原訟法庭根據第(2A)或(2B)款就任何名列根據第 58B 條公布的遞補順位名單的候選人而作出的裁定，以致該名單的有效性在選舉呈請中受質疑，則在該呈請的審訊完結時，原訟法庭須裁定該名單是否有效。”。

新條文 加入 —

“11A. 修訂第 70B 條(終審法院的裁定)

(1) 第 70B(a)(ii)(B)條 —

廢除

“及”。

(2) 在第 70B(a)(ii)條之後 —

加入

“(iii) 如選舉呈請是質疑某人根據第 35A 或 35B 條成為議員的資格，該人是否有資格根據該條成為議員；

(iv) 如該選舉呈請是關乎 —

(A) 某人的姓名列入；或

(B) 某人的姓名沒有列入，

根據第 58B 條公布的遞補順位名單，該姓名是否須列入該名單；

(v) 如該選舉呈請是關乎某人在根據第 58B 條公布的遞補順位名單上的排名名次 —

(A) 該人在該名單上的排名名次是否正確；及

(B) 如不正確，正確的排名名次為何；

(vi) 如因原訟法庭根據第 67(2A)或(2B)條就任何名列根據第 58B 條公布的遞補順位名單的候選人而作出的裁定，以致該名單的有效性在選舉呈請中受質疑，該名單是否有效；及”。

12 在建議的第 78(1)(b)條中，在“35A”之後加入“、35B 及 58B”。

14 在“及(4)”之後加入“、35B(3)及(4)”。

15 在“及(4)”之後加入“、35B(3)及(4)”。