

LEGISLATIVE COUNCIL BRIEF

LEGISLATIVE COUNCIL (AMENDMENT) BILL 2012

INTRODUCTION

A With the approval of the Chief Executive in Council, we plan to introduce the Legislative Council (Amendment) Bill 2012 (“the Bill”), at Annex A, into the Legislative Council (“LegCo”) on 8 February 2012.

2. The Bill amends the Legislative Council Ordinance (Cap. 542) (“LCO”) to provide for a restriction that a LegCo Member who has resigned from office would be prohibited from standing in any by-elections in the same LegCo term within six months of his resignation.

JUSTIFICATIONS

(A) Public consultation

3. The Government introduced the Legislative Council (Amendment) Bill 2011 into the LegCo on 8 June 2011. It proposed a replacement arrangement for filling a vacancy arising from resignation of LegCo Members and other situations. In the context of the discussion of the Bills Committee on the Legislative Council (Amendment) Bill 2011, the Bills Committee was of the view that the Administration should provide more time to consider suggestions of the Members and listen further to public views on the arrangements for filling vacancies in the LegCo. The Government announced on 13 July 2011 that it would not resume second reading debate and the voting of the Legislative Council (Amendment) Bill 2011 and would conduct a public consultation on the proposals for filling mid-term vacancies in the LegCo for about two months.

4. The Consultation Paper on Arrangements for Filling Vacancies in the Legislative Council was published on 22 July 2011. The Consultation Paper gave an account of the incident whereby five LegCo Members resigned at will in 2010 to trigger by-elections in which they stood and sought to be re-elected. In the Consultation Paper, the Government expressed the view that it is an abuse of the electoral process for a Member to resign in order to trigger a by-election in which the Member intends to stand and seek re-election, and explained the mischief

involved. It reviewed the arrangements for filling vacancies in the LegCo and set out four options to fill mid-term vacancies in the LegCo. The four options were:

- (a) Option 1: restricting resigning Members from participating in any by-election in the same term;
- (b) Option 2: a replacement mechanism using the same candidate list followed by a precedence list system;
- (c) Option 3: a replacement mechanism which does not cover causal vacancies arising from death, serious illness or other involuntary circumstances; and
- (d) Option 4: a replacement mechanism using the same candidate list, followed by leaving the seat vacant when the list is exhausted.

5. Among other things, the Consultation Paper invited the public to express views on:

- (a) whether Members resigning at will, triggering by-elections in which they seek to stand and involving a considerable amount of public funds, is a loophole that needs to be plugged;
- (b) if it is considered that the loophole should be plugged, which of the four options set out above would be preferred;
- (c) if it is considered that the loophole need not be plugged, whether the status quo should be maintained; and
- (d) any other feasible options or suggestions.

6. During the public consultation period which ended on 24 September 2011, two public forums were organised by the Government to engage the public and to gauge their views. The Chief Secretary for Administration, the Secretary for Constitutional and Mainland Affairs and other relevant policy secretaries also attended 11 forums or discussion sessions organised by different organisations to collect their views. Groups, organisations and individual members of the community were invited to submit their views on the key issues set out in the Consultation Paper as well as other related topics. During the period, some academic and non-governmental organisations as well as the media also conducted polls to gauge the views of the public.

(B) Views received during the public consultation

7. The Government published the Consultation Report on Arrangements for Filling Vacancies in the Legislative Council on 20 January 2012, which provides a summary of the views received during the public consultation period. In brief:

- (a) the results of the various polls indicate that over 50% or close to 50% of the respondents consider that the Government needs to plug the loophole in the existing legislation by way of legislative amendments. The loophole is that Members may resign at will to trigger by-elections in which they seek to stand and be re-elected. Option 1 (restricting resigning Members from participating in any by-election within the same LegCo term) commands more support than the other three options;
- (b) around 70% of the 31 120 written submissions received support plugging the loophole by way of legislative amendments and Option 1 commands more support than the other three options; and
- (c) the community generally considers that by-elections should continue to be held as a means for the electorate to make a choice when a mid-term vacancy arises. The holding of a by-election to fill a mid-term vacancy could address the concern about the replacement mechanism proposed in the Legislative Council (Amendment) Bill 2011, under which electors no longer have a chance to make a choice afresh when a causal vacancy arises mid-term.

8. From the views received, there are clear indications that:

- (a) there is strong public support for the Government to address the mischief; and
- (b) Option 1 receives more support than the other three Options.

(C) Latest proposal

9. Having considered the above, we propose to put forth the latest proposal as set out in (a) to (c) below. The LCO will be amended to implement the latest proposal:

- (a) a vacancy arising mid-term in a geographical constituency ("GC"), the District Council (second) functional constituency ("DC (second) FC") or any other functional constituency ("FC") under section 15 or section 72 of the LCO or Article 79 of the Basic Law would continue to be filled by a by-election;

- (b) a Member returned by a GC, the DC (second) FC or any other FC who has voluntarily resigned from office under section 13 or section 14 of the 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 LegCo term and the following LegCo term, the prohibition will not be applicable to the by-elections in the following LegCo term.

10. This is a more focused approach to address the mischief arising from Members resigning at will in order to trigger by-elections, as the only persons affected are the resigning Members. The proposal is a simple and direct response to plug the loophole of a Member resigning in order to trigger a by-election in which the Member intends to stand and seek re-election.

11. We have sought legal advice on the proposal from Lord Pannick QC who confirms that the proposal is constitutional for the following reasons:

- (a) the right to vote and to stand for election guaranteed by Article 26 of the Basic Law is not absolute. Restrictions may be imposed on this right so long as they are proportionate to a legitimate aim. Article 68 and Annex II of the Basic Law give the LegCo a broad discretion in determining the contents of the legislation which governs the “specific method” for forming the LegCo. In applying the proportionality test, the courts would accord considerable weight to the views of the LegCo;
- (b) the Administration and the LegCo are entitled to regard it as an abuse of the power of a Member to resign for him to do so in order to trigger a by-election in which the Member intends to stand and seek re-election. The Administration is entitled to regard this as an abuse because the constituents are deprived of a representative during the period between resignation and the by-election; the LegCo is deprived of a Member during that period; the by-election will involve costs to public funds; and if such resignations to trigger by-elections become a common occurrence, respect for the electoral process will be undermined, particular when such a device will lead to a low turnout rate in the by-election;
- (c) it is proportionate to the mischief for the LegCo to approve an Ordinance which adopts the proposal. There is no question of a

Member being required to stand down before the end of his term. Any Member who is considering resigning and forcing a by-election would know of the consequences;

- (d) moreover, a six-month period is long enough to deter abusive conduct and not so long as would render the restriction more than is necessary to address the mischief; and
- (e) under the proposal, a by-election will continue to be held where a Member resigns. Although by-elections may shift the political balance in a multi-member proportional representation system, the current system involves by-election and the LegCo is entitled to conclude that by-elections are desirable to give the electorate the opportunity to replace a resigning Member.

THE BILL

12. The main provisions of the Bill are explained below:

- (a) Clause 1 sets out the short title and provides for the commencement; and
- (b) Clause 3 amends section 39 of the LCO to provide for the restriction.

B The existing provisions being amended are at Annex B.

LEGISLATIVE TIMETABLE

13. The legislative timetable will be:

Publication in the Gazette	3 February 2012
First Reading and Commencement of Second Reading Debate	8 February 2012
Resumption of Second Reading Debate, Committee Stage and Third Reading	To be notified

IMPLICATIONS OF THE PROPOSAL

14. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. The proposal will not affect the current binding effect of the LCO. Outside Counsel's opinion on the constitutionality of the latest proposal in paragraph 9 has been sought and is summarised in paragraph 11 above. The proposal has no economic, environmental or productivity implications, and does not require additional financial and civil service resources.

PUBLIC CONSULTATION

15. A public consultation on arrangements for filling vacancies in the LegCo was conducted and the details are set out in paragraphs 4 to 8 above. We consulted the LegCo Panel on Constitutional Affairs on 31 January 2012 on the latest proposal. Some Members supported the latest proposal but some other Members held different views and considered that the status quo should be maintained.

PUBLICITY

16. A press release will be issued and a spokesman will be made available to address media enquiries.

ENQUIRY

17. Any enquiry on this brief can be addressed to Ms Anne Teng, Principal Assistant Secretary for Constitutional Affairs and Mainland Affairs at 2810 2908.

**Constitutional and Mainland Affairs Bureau
1 February 2012**

A BILL

To

Amend the Legislative Council Ordinance to impose a restriction on the nomination of candidates at a by-election of the Legislative Council.

Enacted by the Legislative Council.

1. Short title and commencement

- (1) This Ordinance may be cited as the Legislative Council (Amendment) Ordinance 2012.
- (2) This Ordinance comes into operation on the commencement of the term of office of the fifth term of office of the Legislative Council in 2012.

2. Legislative Council Ordinance amended

The Legislative Council Ordinance (Cap. 542) is amended as set out in section 3.

3. Section 39 amended (when person is disqualified from being nominated as a candidate and from being elected as a Member)

After section 39(2)—

Add

- “(2A) A person is also disqualified from being nominated as a candidate at a by-election if—
- (a) within the 6 months ending on the date of the by-election—
 - (i) the person’s resignation under section 14 as a Member took effect; or

- (ii) the person was taken under section 13(3) to have resigned from office as a Member; and
 - (b) no general election was held after the relevant notice of resignation or notice of non-acceptance took effect.”.
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Explanatory Memorandum

The object of this Bill is to introduce a restriction to prohibit a person who has resigned, or is taken to have resigned, as a Member of the Legislative Council from standing for a by-election to be held within the 6 months after the resignation in the same term of office of the Legislative Council.

Chapter 542	LEGISLATIVE COUNCIL ORDINANCE	Gazette Number	Version Date
Section 39	When person is disqualified from being nominated as a candidate and from being elected as a Member	2 of 2011	11/03/2011

Remarks:

The amendments made to this section by the Legislative Council (Amendment) Ordinance 2011 (2 of 2011) shall come into operation on 11 March 2011 for the purpose only of enabling arrangements to be made for-

- (a) the holding of the elections of members of the Election Committee under the Chief Executive Election Ordinance (Cap 569) in 2011; and
 - (b) the holding of the Legislative Council general election in 2012.
- (1) A person is disqualified from being nominated as a candidate at an election, and from being elected as a Member, if the person-
- (a) is-
 - (i) a judicial officer; or
 - (ii) a prescribed public officer; or
 - (iii) an officer of the Legislative Council or a member of staff of The Legislative Council Commission; or (Amended 48 of 1999 s. 24)
 - (b) has, in Hong Kong or any other place, been sentenced to death or imprisonment (by whatever name called) and has not either-
 - (i) served the sentence or undergone such other punishment as a competent authority may have been substituted for the sentence; or
 - (ii) received a free pardon; or
 - (c) has been convicted of treason; or
 - (d) on the date of nomination, or of the election, is serving a sentence of imprisonment; or
 - (e) without limiting paragraph (b), where the election is to be held or is held within 5 years after the date of the person's conviction, is or has been convicted-
 - (i) in Hong Kong or any other place, of an offence for which the person has been sentenced to imprisonment, whether suspended or not, for a term exceeding 3 months without the option of a fine; or
 - (ii) of having engaged in corrupt or illegal conduct in contravention of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap 554); or
 - (iii) of an offence against Part II of the Prevention of Bribery Ordinance (Cap 201); or
 - (iv) of any offence prescribed by regulations in force under the Electoral Affairs Commission Ordinance (Cap 541); or (Replaced 10 of 2000 s. 47)
 - (f) is-
 - (i) ineligible to be a candidate, or to be elected as a Member, at the election; or
 - (ii) disqualified from being a candidate, or from being elected as a Member, at the election, because of the operation of this or any other law; or
 - (g) is a representative or salaried functionary of a government of a place outside Hong Kong; or
 - (h) is a member of any national, regional or municipal legislature, assembly or council of any place outside Hong Kong, other than a people's congress or people's consultative body of the People's Republic of China, whether established at the national or local level; or
 - (i) is an undischarged bankrupt or, within the previous 5 years, has either obtained a discharge in bankruptcy or has entered into a voluntary arrangement within the meaning of the Bankruptcy Ordinance (Cap 6) with the person's creditors, in either case without paying the creditors in full. (Amended 25 of 2003 s. 22)
- (2) A person is also disqualified from being nominated as a candidate at an election if the person 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, but a person

disqualified under this subsection is eligible for nomination as a candidate if, under that Ordinance, it is subsequently found that the person has become capable of managing and administering his or her property and affairs. (Replaced 25 of 2003 s. 22)

- (3) A person is also disqualified from being elected as a Member if the person 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, but a person disqualified under this subsection ceases to be disqualified if, under that Ordinance, it is subsequently found that the person has become capable of managing and administering his or her property and affairs. (Replaced 25 of 2003 s. 22)
- (4) A person is also disqualified from being elected as a Member for a functional constituency (other than the District Council (first) functional constituency and the District Council (second) functional constituency) if, since the close of nominations, the person has ceased to have a substantial connection with the constituency. (Amended 2 of 2011 s. 17)
- (5) In this section-

"judicial officer" (司法人員) means the holder of a judicial office, as defined in section 2 of the Public Service Commission Ordinance (Cap 93);

"prescribed public officer" (訂明的公職人員) means any of the following-

- (a) the Chairman of the Public Service Commission;
- (b) the Commissioner and Deputy Commissioner of the Independent Commission Against Corruption and the holder of any other office under the Independent Commission Against Corruption Ordinance (Cap 204);
- (c) The Ombudsman and the holder of any appointment under section 6 of The Ombudsman Ordinance (Cap 397);
- (d) a member of the Electoral Affairs Commission;
- (e) the chief executive of the Monetary Authority and any member of the senior management of that Authority, including divisional heads, executive directors, managers and counsel employed by that Authority;
- (ea) the Privacy Commissioner for Personal Data and any person employed or engaged by him or her under the Personal Data (Privacy) Ordinance (Cap 486); (Added 48 of 1999 s. 24)
- (eb) the Chairperson of the Equal Opportunities Commission and any person employed or whose services are engaged by the Commission under the Sex Discrimination Ordinance (Cap 480); (Added 48 of 1999 s. 24)
- (f) any person holding an office, whether permanent or temporary, in a Government department or bureau and employed in the department or bureau.