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Report of the Bills Committee on Village Representative Election Bill

Purpose

This paper reports on the deliberations of the Bills Committee on Village Representative Election Bill.

Background

2. A system of village representation has evolved in the New Territories (NT) over the decades. Village Representatives (VRs) of a designated area are the members of the Rural Committee (RC) of that area. There are 27 RCs in total. The chairmen of RCs are ex officio members of the relevant District Councils (DCs). The chairmen and vice-chairmen of RCs are Ex Officio Councillors of Heung Yee Kuk. Special Councillors of the Full Council of Heung Yee Kuk are elected by the Ex Officio Councillors of three districts, namely, Tai Po, Yuen Long and Southern District, from among VRs.

3. Heung Yee Kuk has become a functional constituency of the Legislative Council (LegCo) since 1994. Since August that year, the elections of VRs have been held every four years in accordance with a set of election rules known as the Model Rules for the Conduct of VR Elections. A VR is defined under section 3(3)(a) of the Heung Yee Kuk Ordinance (Cap. 1097) to mean “a person elected or otherwise chosen to represent a village who is approved by the Secretary for Home Affairs”. In the 1999 elections of VRs, about 1 000 VRs were elected from about 600 indigenous villages and 100 non-indigenous villages.

4. Two non-indigenous villagers challenged the validity of the 1999 electoral arrangements for the office of VRs at their respective villages by judicial review proceedings. In respect of the challenge, the Court of Final Appeal (CFA) held, among other things, that -

- (a) exclusion of non-indigenous villagers from voting or standing for election at the elections of VRs was contrary to the right to participate in public affairs under Article 21(a) of the Hong Kong Bill of Rights; and
- (b) electoral arrangement under which non-indigenous women married to indigenous men had the right to vote but non-indigenous men married to indigenous women were excluded from voting, contravened section 35 of the Sex Discrimination Ordinance (Cap. 480).

5. After the delivery of the CFA judgment, there were calls on the Government to bring the elections of VRs under statutory control. According to the Administration, the Government recognises that there is a need for reforming the elections of VRs. Having reviewed the procedure and arrangements for rural elections, the Government decided that the conduct of such elections should be brought under statutory control.

The Bill

6. The main objects of the Bill are as follows -
- (a) to provide for the establishment of the office of resident representative for an Existing Village and the establishment of the office of indigenous inhabitant representative for an Indigenous Village or a Composite Indigenous Village;
 - (b) to provide for the elections of Resident Representatives and Indigenous Inhabitant Representatives;
 - (c) to provide for the constitution of a RC to be construed to take account of the provisions of this Bill;
 - (d) to amend the Electoral Affairs Commission Ordinance (Cap. 541) to extend the functions of the Electoral Affairs Commission (EAC) (except its functions under section 4(a) and (c) of that Ordinance) to the elections of VRs and to require the functions of the EAC in relation to the conduct of those elections to be performed through the Director of Home Affairs; and
 - (e) to amend the Heung Yee Kuk Ordinance to revise the terms of office of the Chairman, Vice-Chairmen and Ordinary Members of the Executive Committee, and the Special Councillors of the Full Council of Heung Yee Kuk that commenced in 1999 and that commences in 2003 to ensure that there is no gap in their terms of office.

The Bills Committee

7. At the House Committee meeting on 11 October 2002, members agreed that a Bills Committee should be formed to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

8. Under the chairmanship of Hon IP Kwok-him, JP, the Bills Committee has held seven meetings with the Administration, and met with deputations at one of the meetings. A list of the organisations and individuals which/who have made submission to the Bills Committee is in **Appendix II**.

Main deliberations of the Bills Committee

Legality of the Bill

Proposed electoral arrangements for the elections of VRs

9. Under the electoral arrangements proposed in the Bill, the elections of VRs will be held for indigenous villages (Indigenous Villages or Composite Indigenous Villages) and existing village settlements (Existing Villages) now included in the village representation system in NT. There will be two types of VRs -

- (a) an Indigenous Inhabitant Representative for an Indigenous Village or a Composite Indigenous Village; and
- (b) a Resident Representative for an Existing Village.

10. The Bill proposes that an Indigenous Inhabitant Representative (or Representatives) for an Indigenous Village or a Composite Indigenous Village will be elected by an electorate comprising the indigenous inhabitants of the Village. A Resident Representative for an Existing Village will be elected by an electorate comprising the residents living in the Village. All VRs will be elected and become members of RC of the area in which the Village is located.

11. The Bill also proposes that the current number of Indigenous Inhabitant Representatives (ranging from one to five) for an Indigenous Village or a Composite Indigenous Village will be retained, and there will be one Resident Representative for each Existing Village.

Consistency with the Hong Kong Bill of Rights

12. Indigenous inhabitants who are resident in a village are entitled to vote in both an Indigenous Inhabitant Representative election and a Resident Representative election. Indigenous inhabitants who are not residents in a

village are only entitled to vote in an Indigenous Inhabitant Representative election. Non-indigenous villagers are only entitled to vote in a Resident Representative election.

13. Some members including Members belonging to the Democratic Party, Hon Albert CHAN and Dr Hon TANG Siu-tong have expressed grave concerns that the Bill may not be consistent with the Hong Kong Bill of Rights since under the proposed electoral arrangements, indigenous inhabitants who are residents in a village will have two votes whereas non-indigenous villagers will only have one vote. They have queried whether such a departure from the principle of identical treatment for all villagers (one person, one vote) can be justified. These members consider that the proposed electoral arrangements are unfair to residents in an Existing Village who are not indigenous inhabitants. Hon Albert CHAN has pointed out that the whole system of the elections of VRs proposed in the Bill would have adverse impact on the rights of non-indigenous villagers in NT.

14. Some other members including Hon Andrew WONG and Hon LAU Wong-fat hold a different view. Hon Andrew WONG has pointed out that a certain degree of disparity of treatment in electoral arrangements may be acceptable as long as it is justifiable and the influence of each elector will be similar. He considers that it is impractical to ask for absolute equality. For instance, in making recommendations on constituency boundaries for DC elections, the EAC is empowered by law to allow deviation from the population quota (which means the total population of Hong Kong divided by the total number of elected members to be returned in a particular election) by not more than 25%. The EAC has also allowed deviation from the population quota by more than 25% for some districts, such as Islands.

15. The Administration is of the position that indigenous villagers need two types of VRs to effectively represent their different interests. An additional vote is given to indigenous inhabitants so that they can elect Indigenous Inhabitant Representatives to ensure that their traditional rights and interests are protected. The Administration considers that the dual representation system is compatible with the International Covenant on Civil and Political Rights which provides that special electoral arrangements can be made for a particular group of people in order to ensure that they can be fairly and justly represented.

16. The Administration has also referred to the general test in *The Queen v Man Wai-keung (No. 2)* to justify the departure from the principle of identical treatment for all villagers. According to that general test, to justify such a departure it must be shown -

- (a) that sensible and fair-minded people would recognise a genuine need for some difference of treatment;

- (b) that the difference embodied in the particular departure selected to meet that need is itself rational; and
- (c) that such departure is proportionate to such need.

The Administration is of the view that the Bill could pass these three tests.

17. The Administration has further pointed out that in determining the reasonableness of the dual representation system, the doctrine of “margin of appreciation” which is recognised by the courts should apply i.e. the Government has “a margin of appreciation” in the determination of what is reasonable. Provided that the reasonableness of a restriction is within the range of reasonable views which the Government can form, the courts cannot substitute their own view for that of the Government.

18. The Administration has also explained that the two types of VRs represent different interests at the village level and there is no overlap of representation. Furthermore, the role of VRs at the village level is mainly advisory. They will not form a village council or committee where they need to decide issues on the basis of voting. The Administration has stressed that the dual representation system proposed in the Bill is reasonable and proportionate, and is consistent with the Hong Kong Bill of Rights.

19. Members expressing concern about the consistency of the Bill with the Hong Kong Bill of Rights are not convinced by the Administration’s explanation. Dr Hon TANG Siu-tong has queried whether it is relevant to apply the general test in *The Queen v Man Wai-keung (No. 2)* which is a criminal case not related to the Hong Kong Bill of Rights, in justifying the unequal treatment in respect of voting right. He has also pointed out that there would be some overlaps in the functions of the two types of VRs in that although these two types of VRs do not need to decide issues on the basis of voting, they, to a certain extent, will compete with one another in respect of the affairs of a Village. The dual representation system will therefore create unfairness. He remains of the view that the dual representation system is not consistent with the Hong Kong Bill of Rights.

20. Members belonging to the Democratic Party have expressed disappointment that the Administration has not been able to put forward sufficient justifications to substantiate its argument that reasonable people will not consider the dual representation system unreasonable. They have pointed out that even if the general test in *The Queen v Man Wai-keung (No. 2)* applies, the dual representation system might fail the three tests described in paragraph 16 above i.e. whether it is necessary, rational, and proportionate to the need.

Consistency with the Heung Kee Kuk Ordinance

21. The Administration has drawn up general guidelines to delineate boundaries of Existing Villages for Resident Representative Elections, the basic principles of which are -

- (a) elections of VRs should be held for villages included in the present village representation system in NT. There are around 700 villages. The existing number of villages should generally be maintained;
- (b) in general, only rural-type settlements should be included in village elections. Multi-storey buildings should be excluded. Resite villages are to be included as far as possible; and
- (c) structures of occupants who voted in the previous rounds of the elections of VRs should generally be included.

22. The Administration has informed the Bills Committee that the maps of the Existing Villages were prepared and posted up in the District Offices in NT, offices of RCs, village offices and notice boards in villages concerned in July and August 2002 to invite comments from residents concerned. During the consultation period, a total of 175 submissions (relating to 145 villages) were received. No objection was received regarding about 80% of the delineated village boundaries. The respective District Officers accepted 117 proposals (about 67%) and rejected 51 proposals (about 29%). Seven proposals were withdrawn by the people concerned of their own accord. For those people whose views were not accepted, they were given a further opportunity to furnish supplementary arguments and information within three days after the issue of the reply of the respective District Officer. During that period, submissions were received for 25 cases. The District Officers accepted views for eight of the cases, while the decisions on other cases were upheld.

23. Hon Albert CHAN has expressed dissatisfaction with the consultation process of the Administration on the maps of Existing Villages. He has pointed out that residents living in remote peripheral areas who would most likely be affected may not be aware of the consultation. Hon Albert CHAN has stressed that it is very unfair that residents who have been living in the village and have participated in previous rounds of the elections of VRs cannot participate in the next round of elections to elect their Resident Representatives. He considers that residents affected should be notified in writing. At the request of Hon Albert CHAN, the Administration has undertaken to consider making the maps of Existing Villages available on the website of the Home Affairs Department for the 2007 elections of VRs.

24. Dr Hon TANG Siu-tong has queried that the Bill may not be consistent with the Heung Yee Kuk Ordinance. He has pointed out that under the Heung

Yee Kuk Ordinance, Heung Yee Kuk is interpreted as representing the whole population of NT, but the demarcation of boundaries for village constituencies as proposed in the Bill may result in some residents in the villages of NT not being eligible to participate in the elections of VRs. Dr Hon TANG Siu-tong has also queried that if DC elections can cover all residents in Hong Kong, there should not be any practical difficulties for the Administration to include all residents of NT in the elections of VRs.

25. The Administration has responded that an Indigenous Village is a community comprising the indigenous inhabitants of that Village. Such a community is not a geographically-defined entity. On the other hand, an Existing Village is a geographically-defined entity. Both indigenous and non-indigenous inhabitants living within the delineated area are residents of that Existing Village. The Administration has pointed out that it is possible that some residents living outside the boundaries of Existing Villages cannot vote in the 2003 elections of VRs. This cannot be helped because it is impracticable to include isolated village houses within the delineated area of the boundary map if they are really too far away. The Administration has further explained that DC elections are different from Resident Representative elections. Electors for the former are assigned to constituencies according to their registered addresses whereas demarcation of village boundaries is necessary for Resident Representative elections before electors are registered. However, the Administration plans to review the village boundaries in time for the 2007 elections of VRs.

26. The Administration has pointed out that according to the Preamble of the Heung Yee Kuk Ordinance, Heung Yee Kuk should “as far as possible be truly representative of informed and responsible opinion in the New Territories”, but it does not mean that the elections of VRs should include all residents in village-type settlements in NT. The Administration has explained that the Heung Yee Kuk Ordinance and the Bill are two separate issues, and the former does not have an overriding effect over other legislation. The fact that Heung Yee Kuk is interpreted under the former to be representing all population in NT does not imply that the elections of VRs have to cover all residents of NT. Moreover, a VR has a role beyond the village as a result of the village representation system in NT. It is the Administration’s position that the Bill is consistent with the Heung Yee Kuk Ordinance.

27. Dr Hon TANG Siu-tong is of the view that to protect the traditional rights and interests of indigenous inhabitants and at the same time comply with the CFA judgment, the Heung Yee Kuk Ordinance should be amended to the effect that it represents indigenous inhabitants of NT only.

Alternative model for the elections of VRs

28. Dr Hon TANG Siu-tong has reiterated his strong queries about the legality of the Bill and has indicated that he objects to the Bill. He has

suggested that as many indigenous inhabitants have expressed strong objection to the Bill, the Administration should withdraw the Bill, and adopt a “wholly indigenous inhabitants model” for the elections of VRs.

29. Members belonging to the Democratic Party have expressed support for Dr Hon TANG Siu-tong’s suggestion. They consider that affairs relating to the traditional rights and interests, in particular the pecuniary interests, of indigenous inhabitants should be handled separately from district affairs. These members have suggested that elections for representatives of indigenous inhabitants and those for representatives of all residents of NT should be held separately. While indigenous inhabitants may be allowed to conduct their clansmen’s elections for their own representatives, representatives of all NT residents should be elected by universal suffrage by all residents of NT.

30. Hon Albert CHAN is of a strong view that the premise of the Bill is irrational as it seeks to cover the elections for indigenous inhabitants, residents in a Village and residents in NT in one piece of legislation. He has expressed grave concern about the actual operation of the village representation system as proposed in the Bill since there are too many obscurities in the proposed provisions. Hon Albert CHAN has stressed that the Administration should deal with these three types of elections separately.

31. Some other members hold a different view. Hon LAU Wong-fat has informed the Bills Committee that Heung Yee Kuk passed a vote in support of the Bill with an overwhelming majority of 105 to 13, and Heung Yee Kuk is supportive of the Bill which is able to protect the traditional rights and interests of indigenous inhabitants of NT and at the same time consistent with the CFA judgment.

32. Hon Andrew WONG has pointed out that CFA has already ruled that the elections of VRs are elections relating to public affairs in which all residents should have the right to participate, and such ruling has a binding effect on courts of lower levels. If the elections of VRs are to become elections on the basis of blood relation, these elections will have no connection with district administration and there will be no mechanism for the Government to listen to the views of indigenous inhabitants in this respect. Hon Andrew WONG has further pointed out that if the elections of VRs are to become purely geographically-defined elections, indigenous inhabitants who have migrated to other countries will have no voting right.

33. The Administration has explained that VRs at present represent both indigenous villagers and non-indigenous villagers. Some of the 1999 elections of VRs have already been opened to non-indigenous villagers who can also become members of RCs and Heung Yee Kuk. It would be a retrograde step to restrict the elections of VRs to indigenous inhabitants only. Furthermore, the “wholly indigenous inhabitants model” would mean restricting the representativeness of RCs and Heung Yee Kuk to indigenous

inhabitants only. Non-indigenous villages would no longer be represented on RCs, and this is also a retrograde step. The Administration has pointed out that adopting the “wholly indigenous inhabitants model” would require major amendments to the Heung Yee Kuk Ordinance and would call into question the need for the ex-officio DC seats for RC chairmen. The Administration has further pointed out that comprehensive consultation on the proposals in the Bill has been conducted among the nine NT DCs and various RCs.

34. The Administration has stressed that it is mindful of the need to protect human rights and prevent sexual discrimination on the one hand and to protect the lawful traditional rights and interests of indigenous inhabitants on the other. The electoral arrangements proposed in the Bill are the best option which can balance the interests of different groups of people, and at the same time are compatible with the laws of Hong Kong and the CFA judgment. The Administration has further informed the Bills Committee that the Equal Opportunities Commission has advised that as far as the Commission can anticipate matters, the provisions of the Bill are consistent with the Sex Discrimination Ordinance. The Administration has also reiterated that a comprehensive review would be conducted on the elections of VRs after the 2003 elections.

Disqualification of civil servants from holding office as VRs, and from being nominated as a candidate and from being elected as a VR

35. Under clause 9(1)(a)(ii) of the Bill, a person elected as a VR is disqualified from holding office if the person is a prescribed public officer. A person is also disqualified under clause 23(1)(a)(ii) from being nominated as a candidate and from being elected as a VR for a Village, if the person is a prescribed public officer. Under clause 2, the term “prescribed public officer” is defined to mean any of the following -

- (a) the Chairman of the Public Service Commission;
- (b) the Commissioner and Deputy Commissioner of the Independent Commission Against Corruption (ICAC) and the holder of any other office under the ICAC 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 EAC;
- (e) the Chief Executive of the Hong Kong Monetary Authority and any member of the senior management of that Authority, including divisional heads, executive directors, managers and counsel employed by that Authority;

- (f) the Privacy Commissioner for Personal Data and any person employed or engaged by him under the Personal Data (Privacy) Ordinance (Cap. 486);
- (g) the Chairperson of the Equal Opportunities Commission and any person employed or whose services are engaged by the Commission under the Sex Discrimination Ordinance; or
- (h) any person holding an office, whether permanent or temporary, in a Government department and employed in the department.

36. Members note that a person who is a Chairman of a RC is already disqualified from holding office as an ex officio member of a DC under section 19(1)(a) of the District Councils Ordinance (Cap. 547), if that person is a prescribed public officer. They consider that it is not inappropriate for a civil servant to hold office as VR so long as he is not eligible for the office of a DC member. Members are of the view that since VRs are not paid and do not enjoy any special rights, civil servants should be allowed to be nominated as candidates and elected as VRs, and to hold office as VRs.

37. The Administration has responded that under the existing electoral laws in Hong Kong, a person is disqualified from being nominated as a candidate at an election for an elected office and from holding an elected office, if he is a prescribed public officer. It is also the normal practice in other jurisdictions not to allow civil servants to run for public offices.

38. The Administration has further explained that its position of not allowing a civil servant to run for and to hold the office of VR are on the basis of the following considerations -

- (a) a civil servant who is also a VR may face a situation where his role as a civil servant conflicts with his role as a VR;
- (b) a civil servant who is also a VR may face a conflict between his official responsibilities as a civil servant (safeguarding the interests of his department) and his public duties as a VR (safeguarding the interests of his village);
- (c) a civil servant who is also a VR may experience or is perceived to have divided loyalties;
- (d) it will be difficult to allow only civil servants to hold office as VR without allowing other prescribed public officers to do so. However, it will be undesirable to allow other prescribed public officers (e.g. the staff of the Ombudsman and the ICAC) to do so;

- (e) in some cases, a civil servant may have or is perceived to have certain advantages over other candidates. The participation of civil servants in public elections may create an uneven playing field for other candidates; and
- (f) it is important to maintain the political neutrality of the civil service.

39. Notwithstanding the Administration's explanation, members remain of the view that it is not necessary to disqualify a civil servant from being nominated as a candidate and elected as a VR, and from holding office as a VR for a Village. They consider that the elections of VRs which are at a very low stratum of the political representative system should not be subject to the restrictions imposed on civil servants in DC or LegCo elections. Members have also pointed out that civil servants have all along been allowed to serve as VRs as long as approval from their respective departments is obtained.

40. Hon Andrew WONG is of the view that it is obvious that a member of the EAC which is empowered to supervise the conduct of the elections of VRs may have a direct conflict of interest if he is allowed to run for or to hold office as a VR. He also considers that for the same reason, a VR or a person who has been a VR within the four years immediately before the date of appointment should not be appointed as a member of the EAC. Hon Andrew WONG has suggested that "a member of the Electoral Affairs Commission" should replace "a prescribed public officer" in clause 9(1)(a)(ii) and clause 23(1)(a)(ii) of the Bill respectively.

41. Hon Andrew CHENG has pointed out that as the ICAC is the primary authority responsible for implementing the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554), the Commissioner and Deputy Commissioner of the ICAC and the holder of any other office under the ICAC Ordinance should also be disqualified from being nominated as a candidate and from being elected as a VR, and from holding office as VRs. Hon Andrew CHENG and Dr Hon TANG Siu-tong have suggested that, to allow civil servants to run for office of VRs, and hold office as VRs, "any person holding an office, whether permanent or temporary, in a Government department and employed in the department" should be deleted from the definition of "prescribed public officer" in the Bill. They have also suggested that the term "prescribed public officer" be amended as "specified public officer" in order to avoid any inconsistency of the former's definition with those in other legislation.

42. A majority of the members of the Bills Committee, however, consider that even if all the prescribed public officers defined in the Bill are allowed to be nominated as a candidate and be elected as a VR, and hold office as VRs, it is unlikely that they will do so in reality, and the problems of possible conflict

of interests can be addressed by adopting appropriate administrative guidelines and measures. They have pointed out that a civil servant would not be able to obtain the approval of his department head for running for the office of a VR, if his official responsibilities as a civil servant may conflict with his public duties as a VR.

43. The Bills Committee has decided that the Chairman should move Committee Stage amendments (CSAs) on its behalf to delete clauses 9(1)(a)(ii) and 23(1)(a)(ii), and to delete the definition of “prescribed public officer” from clause 2 of the Bill. The Bills Committee has also decided that the Chairman should move consequential amendments on its behalf to delete the proposed definition of “Rural Committee” in section 3(e), and sections 4 and 10 from Schedule 4 to the Bill to the effect that -

- (a) a member of Heung Yee Kuk, a member of a RC or a VR, or a person who has been a member of Heung Yee Kuk, a member of a RC or a VR within the four years immediately before the date of appointment, will not be ineligible for appointment as a member of the EAC or to hold office as such; and
- (b) a member of the EAC during his term of office will not be disqualified, or a person who has ceased to hold office as a member of the EAC will not be disqualified during the period of four years beginning on the date he ceases to hold office, from being a member of Heung Yee Kuk, from being a member of a RC or a VR.

44. After the Bills Committee had reported its deliberations to the House Committee, the Administration informed the Bills Committee that it would take over the CSAs to be moved by the Chairman on behalf of the Bills Committee to clauses 2(1), 9(1), 23(1) and Schedule 4. Members of the Bills Committee and all other LegCo Members were informed of the Administration's decision vide LC Paper No. CB(2)1061/02-03.

Eligibility requirements for registration as an elector and for nomination as a candidate in a Resident Representative election

Interpretation of the term “resident”

45. Under clause 15(4) of the Bill, a person is not eligible to be registered as an elector for an Existing Village unless he -

- (a) is a resident of the Village;
- (b) has been a resident of the Village for the three years immediately before applying to be registered;

- (c) is an adult at the time of applying to be registered; and
- (d) is a Hong Kong permanent resident.

46. Under clause 22(1) of the Bill, a person is eligible to be nominated as a candidate at an election for an Existing Village only if he -

- (a) is a resident of the Village;
- (b) has been a resident of the Village for the six years immediately preceding the nomination;
- (c) has reached 21 years of age;
- (d) is registered, and eligible to be registered, as an elector for the Village;
- (e) is not disqualified from voting at the election; and
- (f) is not disqualified from being nominated as a candidate at the election, or from being elected as a Resident Representative for the Village, by virtue of section 23 or any other law.

47. Members have raised queries about the interpretation of the term “resident” in the Bill.

48. The Administration has explained that a “resident” in the Bill, in relation to an Existing Village, is defined as a person whose principal residential address is in the Village. The Bill defines “principal residential address” under clause 2(1), in relation to a person, as the address of the dwelling place at which the person resides and which constitutes the person’s sole or main home. In case of disputes, the amount of time a person stayed in the dwelling place will be used to determine whether that place is considered his principal residential address.

49. The Administration has further explained that a resident may register as an elector in the Resident Representative election for an Existing Village if he meets all the eligibility requirements. The Electoral Registration Officer will then compile and publish a provisional register of electors for the Village in accordance with the Electoral Affairs Commission Regulations. A person who is dissatisfied with a decision of the Electoral Registration Officer may appeal against the decision to a Revising Officer (who will be a magistrate). A hearing of the appeal will be held during which the appellant will need to prove his case to the Revising Officer whose decision will be final.

50. Hon Andrew WONG, Dr Hon TANG Siu-tong, Hon Albert CHAN and Hon WONG Sing-chi have pointed out that for practical reasons, some of the

villagers have moved out of the villages to the vicinity of their work places. Many of them, however, still maintain their residences in and association with the villages. Most of them are born and have lived in the villages for a very long time and continue to make great contributions to the villages. However, these people will become ineligible to be registered as electors or nominated as candidates for Resident Representative elections in accordance with the definition of “principal residential address” in the Bill. They anticipate that such a definition will give rise to a lot of grievances and controversies. Dr Hon TANG Siu-tong has also expressed concern that although the determination of the Revising Officer is final, people may still seek judicial review to challenge the results of the election. In that case, huge legal cost will be incurred.

51. Hon Andrew WONG and Dr Hon TANG Siu-tong have suggested that the Administration should amend the Bill to the effect that a person who has close affiliations with a village and who has a residence in that village will be allowed to choose to use their residences in the village as his principal residential address for the purpose of elector registration for an Existing Village.

52. The Administration has responded that it is not appropriate to allow a person to choose his principal residential address, without reference to the facts and merits of the case, if he has two residences. The Administration has pointed out that what is a person’s principal residential address is a matter of facts. In case of doubt, the amount of time a person stayed at the address would be used to determine whether the place should be considered as his principal residential address.

“Residency-in-village” requirements

53. Members belonging to the Democratic Party and Hon Albert CHAN have raised strong objection to the “residency-in-village” requirements for electors and candidates for Resident Representative elections proposed in the Bill. They have queried whether such stringent “residency-in-village” requirements are necessary as they will deprive many residents of their right to vote and to stand for election. These members consider that the “residency-in-village” requirements should be removed so that they will be consistent with those applicable in DC and LegCo elections as all candidates are required to be familiar with their constituencies. They have pointed out that the same requirements should be adopted for all public elections.

54. Hon Andrew CHENG has pointed out that a resident who has moved to live in an Existing Village in 2002 would not be eligible to stand as a candidate in the elections of VRs to be conducted in 2003 and 2007. He considers the “residency-in-village” requirement for candidates for Resident Representative elections very unreasonable as that resident has to wait for 10 years to be able to run for an office of VR in that Village. Hon Andrew CHENG has stressed

that it should be up to electors to decide whether a person should be a Resident Representative of their Village even though the principal residential address of that person is not in that Village. He considers that application of the concept of “ordinary residence” is adequate for the residency requirement of a candidate in Resident Representative elections.

55. Hon TAM Yiu-chung and Hon Andrew WONG, however, are of the view that the “residency-in-village” requirements proposed in the Bill are acceptable. Hon Andrew WONG opines that it is acceptable to impose residency restrictions on electors and candidates for public elections. He has also pointed out that the elections of VRs, which are to a certain extent clansmen’s elections, are different from DC or LegCo elections. Hence, the restrictions on electors and candidates for these elections may not necessarily be the same.

56. The Administration has explained that the concept of “residency-in-village” is different from the concept of “ordinary residence”, and there is a real need for the “residency-in-village” requirements for electors and candidates in Resident Representative elections because -

- (a) the electors and the candidates should have some knowledge and understanding of the Village and a sense of belonging to the village community; and
- (b) “vote planting” in a small electorate is a real possibility and a “residency-in-village” requirements prevent such electoral abuse.

57. The Administration has pointed out that as these eligibility requirements are applicable to all i.e. both indigenous inhabitants and non-indigenous villagers; hence there is no disparity of treatment.

58. The Administration has also explained that the elections of VRs are different from DC or LegCo elections in that the constituencies of the former are smaller than those of the latter in terms of both area and population. It is necessary for both the electors and candidates in the elections of VRs to establish their association with the village communities concerned and develop their sense of belonging to the villages so that electors can vote for the right candidates and the candidates will know the village as well as the residents there well enough to discharge the duties of VRs effectively.

59. Hon Albert CHAN has advised the Bills Committee that he would move CSAs to delete the “residency-in-village” requirements i.e. clauses 15(4)(b) and 22(1)(b) from the Bill. Hon TAM Yiu-chung has indicated that he considers the proposed “residency-in-village” requirements a compromise option and does not support the CSAs to be moved by Hon Albert CHAN.

Eligibility requirements for registration as an elector in an Indigenous Inhabitant Representative election

60. Under clause 15(5)(a), a person is not eligible to be registered as an elector for an Indigenous Village or a Composite Indigenous Village unless he is “an indigenous inhabitant of the Village, or a spouse of an indigenous inhabitant of the Village”. The Administration has proposed that the “surviving spouse” (i.e. the widow/widower) of an indigenous inhabitant should also be eligible so long as they have not re-married. The Administration will move CSAs to amend this clause to such effect, and to add a definition of “surviving spouse” to clause 2 of the Bill.

Offices of the two types of VRs

Functions of two types of VRs

61. Under clause 6(4) of the Bill, the functions of an Indigenous Inhabitant Representative for an Indigenous Village or a Composite Indigenous Village are -

- (a) to reflect views on the affairs of the Village on behalf of the indigenous inhabitants of the Village; and
- (b) to deal with all affairs relating to the lawful traditional rights and interests, and the traditional way of life, of those indigenous inhabitants.

62. Under clause 5(3) of the Bill, the function of a Resident Representative for an Existing Village is to reflect views on the affairs of the Village on behalf of the residents of the Village. A Resident Representative cannot deal with any affair relating to the lawful traditional rights and interests of indigenous inhabitants.

63. Members have asked about the definition of “lawful traditional rights and interests of indigenous inhabitants of the New Territories”. The Administration has informed the Bills Committee that there is no such definition. However, these rights and interests are generally related to land matters which are -

- (a) building of small houses by male indigenous villagers over the age of 18 under the Small House Policy;
- (b) burial in permitted areas (usually hillsides) outside gazetted cemeteries;
- (c) exemption from government rent; and

- (d) exemption from government rates.

The Administration has, however, pointed out that although it is not aware of other traditional rights and interest, there is no guarantee that the above list is exhaustive.

64. Hon Albert CHAN and Hon WONG Sing-chi have expressed concern that there will definitely be some overlaps in the functions of the two types of representatives. They have also queried how the Administration will deal with the views of these representatives which may be conflicting with each other. Hon Albert CHAN considers that the Bill as presently worded seems to belittle the position of a Resident Representative because an Indigenous Inhabitant Representative may also reflect views on the affairs of the Village. Hon WONG Sing-chi is of the view that future confusion and disputes can be avoided if there is only one type of VRs.

65. The Administration has explained that the two types of VRs have different functions, but there could be some overlaps in the functions of the two types of representatives at the village level. An Indigenous Inhabitant Representative may deal with all affairs relating to the lawful traditional rights and interests, such as certifying the indigenous status of a person for the purpose of applying for permission to build a small house under the Small House Policy. A Resident Representative may not perform such a "certification function". However, a Resident Representative may reflect views on all matters relating to affairs of the Village on behalf of the residents of the Existing Village. It is necessary for an Indigenous Inhabitant Representative to reflect views on the affairs of the Village on behalf of the indigenous inhabitants of the Village because some affairs may relate to the lawful traditional rights and interests of indigenous inhabitants.

66. The Administration has also pointed out that these two types of VRs will only perform advisory but not executive functions; hence there will not be any confusion. The Government will accord equal importance to the views of both Indigenous Inhabitant Representatives and Resident Representatives as both types of representatives are VRs even though they will be representing different interests.

67. Hon Albert CHAN is of the view that the functions of the two types of VRs should be kept distinct from another in order to avoid any confusion and conflict. He has expressed concern that giving an extra say to the Indigenous Inhabitant Representative in the affairs of the Village is unfair to non-indigenous villagers and will precipitate conflicts in the Village. Hon Albert CHAN considers that the Administration has given an additional say to the Indigenous Inhabitant Representative in the affairs of the Village for the sake of allaying the objection of indigenous inhabitants to the Bill. He has expressed strong dissatisfaction with the arrangement. Hon Albert CHAN has indicated that he would move a CSA to amend clause 6(4) of the Bill to the

effect that the functions of the Indigenous Inhabitant Representative for an Indigenous Village or a Composite Indigenous Village will be limited to dealing with all affairs relating to the lawful traditional rights and interests, and the traditional way of life, of indigenous inhabitants.

Need for the office of an indigenous inhabitant representative

68. In response to the suggestion that there should be only one type of VRs representing both indigenous inhabitants and non-indigenous villagers, the Administration has explained that Article 40 of the Basic Law states that “the lawful traditional rights and interests of the indigenous inhabitants of the New Territories shall be protected by the Hong Kong Special Administrative Region”. The main reason for establishing the office of Indigenous Inhabitant Representative is to ensure that the interests of indigenous inhabitants are represented effectively.

69. The Administration has informed the Bills Committee that according to an informal survey conducted by the Home Affairs Department in 1999 on the basis of information obtained from VRs and village elders, there were 240 000 indigenous inhabitants represented by VRs under the village representation system. Among these, 116 000 (48.3%) lived in villages in NT, 54 000 (22.5%) lived in Hong Kong outside villages and 70 000 (29.2%) lived overseas. If there is only one type of VRs elected by all village residents, 51.7% of the indigenous inhabitants (i.e. indigenous inhabitants not living in a village in NT) will lose their right to vote. Accordingly, there is a real need to have Indigenous Inhabitant Representatives to represent both indigenous inhabitants who live in villages in NT and those who live outside these villages.

Use of village offices by VRs

70. Members have asked about the future use of village offices which at present are mostly used by indigenous inhabitants. The Administration has informed the Bills Committee that some village offices are on private property, while others are on Government land. The Administration intends that such premises can be used by all VRs of the village concerned. Hon Andrew WONG has pointed out that if a village office is built on private land and funded by indigenous inhabitants, a Resident Representative may be prevented from using that village office.

71. The Administration has explained that if a village office is on Government land, it should be used by all the residents in the Village. If a village office is on private land, it will not create too much problem even if a Resident Representative is prevented from using that village office because Indigenous Inhabitant Representatives and the Resident Representative in a Village do not form a village council. The former cannot hold a meeting in the village office excluding participation of the Resident Representative and make decision on the affairs of that Village. The Administration has pointed

out that clause 61 of the Bill provides that a VR is a member of the relevant RC. The Administration has further pointed out that if a VR is prevented from attending a meeting held by a RC in a village office, that meeting without the participation of the VR cannot be regarded a meeting of the RC. The Administration has informed the Bills Committee that it would review the situation of village offices after the 2003 elections of VRs.

72. Hon Andrew WONG and Dr Hon TANG Siu-tong have suggested that the Administration should increase its support to village offices as the elections of VRs will be put under statutory control after enactment of the Bill. They have also sought clarification as to whether the Government will pay an allowance to VRs.

73. The Administration has responded that the Administration has not made provision for the payment of an allowance to VRs. However, the Administration has undertaken to review the subsidies to village offices and RCs through normal resource allocation procedures.

Village by-elections

74. Under clause 21(1) of the Bill, the EAC has to arrange for a village by-election for a Village to be held when there is a vacancy in the office of VR for the Village. Clause 21(2) provides that a village by-election is not to be held within the four months preceding the end of the current term of office of the VR concerned. It follows that a village by-election has to be held repeatedly until the vacancy is filled or until there are only four months remain before the end of the current term.

75. Hon Andrew WONG has suggested that in case no candidate is validly nominated for the election of VRs in a Village, or the number of candidates validly nominated for the election of VRs for the Village is less than the number of VRs to be returned for the Village at the election, the VR office should be left vacant and there is no need to hold village by-election.

76. After consideration of Hon Andrew WONG's view, the Administration has agreed, as an alternative, to amend clause 21 of the Bill to the effect that the EAC needs not hold a village by-election for a Village where the election for that Village has failed in total more than once by adding -

“(1A) The Electoral Affairs Commission is not required, on the making of a declaration that an election for a Village has failed as provided in section 29(2)(a), to arrange a village by-election for the Village to be held if the election declared to have failed is a village by-election that was held on the making of another declaration that an election for the Village has failed as provided in section 29(2)(a).”.

77. Members note that clause 21(2) of the Bill is similar to section 33(2) of the District Councils Ordinance and section 36(2) of the Legislative Council Ordinance (Cap. 542). They consider that as a lot of resources will be incurred, it may not be worthwhile to hold a by-election to fill a vacancy if there are only a few months remain before the end of the current term of the office concerned. Members have suggested that the Administration should extend the period preceding the end of the current term of office of the VR concerned for which no village by-election to fill a vacancy would need to be held as well as the same period for similar requirement for holding a DC or LegCo by-election. The Administration has undertaken to examine the issue, together with similar requirement for holding a DC or LegCo by-election, in the review of rural elections to be conducted after the 2003 elections of VRs.

Election petition

78. Under clause 40, an election petition questioning an election may be lodged -

- (a) by 10 or more electors entitled to vote at the election; or
- (b) by a person claiming to have been a candidate at the election.

79. Hon Albert CHAN has expressed concern that the requirement of 10 or more electors to lodge an election petition is unfair to a small Village where the number of registered electors is expected to be very small. He has suggested that a percentage of the registered electors in a Village can also be used as a threshold so that it will be easier for the electors in a small Village to lodge an election petition.

80. In view of the small size of some of the Villages, the Administration has agreed to amend clause 40 to the effect that an election petition may be lodged either by five or more electors entitled to vote at the election or by a candidate at the election.

Notice of resignation given by a VR

81. Under clause 10(1), a VR may resign his office by giving written notice of his resignation to the Director of Home Affairs. However, clause 10(2) provides that a notice of resignation is not effective unless it is signed by the person concerned. Members have queried how the effective date of a notice of resignation given by a VR is determined if the notice has been sent by facsimile transmission or by e-mail to the Director of Home Affairs.

82. The Administration has responded that clause 10 is modelled on section 25 of the District Councils Ordinance and on section 14 of the Legislative Council Ordinance. As a notice of resignation has to be signed, a copy of such a notice would not suffice. The original of the signed notice has to be

sent to the Director of Home Affairs. A copy of the notice sent by facsimile transmission therefore would not satisfy the requirement.

83. Hon Andrew CHENG has indicated that he does not disagree with the Administration that a VR must send the original of his notice of resignation to the Director of Home Affairs. He, however, considers that such a requirement should be explicitly specified in the legislation for the avoidance of any dispute. Members have requested that the Administration should reconsider in future review whether clause 10(2) as presently worded and similar provisions in the District Councils Ordinance and the Legislative Council Ordinance have adequately reflected the policy intention of requiring the receipt of the original of the signed notice of resignation.

Who is entitled to vote at an election

84. Clause 13 provides that only a person registered as an elector is entitled to vote at an election. Hon Albert CHAN is of the view that the drafting of the Chinese version of clause 13(3)(b) “影響有關的人被控和被裁定犯與上述選舉的投票有關的罪行的法律責任” can be improved.

85. The Administration has responded that clause 13(3)(b) which follows the wording in section 29(7)(b) of the District Councils Ordinance and section 48(7)(b) of the Legislative Council Ordinance should be consistent with similar provisions in these Ordinances. The Administration has undertaken to raise the matter with the Department of Justice and the Constitutional Affairs Bureau for future review.

Consequential amendments to Electronic Transactions (Exclusion) Order

86. Sections 5 and 6 of the Electronic Transactions Ordinance (Cap. 553) provide that electronic records and digital signatures satisfy the requirements for writing and signature in law.

87. The Administration has proposed to add sections 8(1), 10(1), 24 and 26(2) of the Village Representative Election Ordinance to Schedules 1 and 2 of the Electronic Transactions (Exclusion) Order (Cap. 553 sub. leg.) to exclude these sections from the application of sections 5 and 6 of the Electronic Transactions Ordinance respectively so that electronic records and digital signatures will not satisfy the requirement of a written notice of non-acceptance of the office of a VR, notice of resignation from the office of a VR, declaration signed by a person nominated as a candidate for an election for a Village and the withdrawal of a candidate's nomination stipulated in these proposed sections. The Administration has advised the Bills Committee that it would move CSAs to Schedule 4 to the Bill to such effect which are modelled on the existing arrangements for the District Councils Ordinance and the Legislative Council Ordinance.

Transitional Arrangements

88. To ensure that there is no gap in their terms of office, the Bill proposes to extend the existing terms of office of Heung Yee Kuk office holders for three months until 31 August 2003, and the existing terms of office of RC office holders and members and VRs approved by the Secretary for Home Affairs until 30 June 2003, so that the terms of office of VRs returned at the elections in 2003 will begin on 1 July 2003. The Bill also proposes that the next terms of office of Heung Yee Kuk office-holders and RC office-holders and members should be 3 years and 9 months so as to re-align their terms of office with the normal 4 years' term.

89. The Administration has informed the Bills Committee that as there is insufficient time for LegCo to pass the Bill before the end of 2002, it would move amendments to Schedules 1, 2 and 3 to the Bill to defer the date of establishment of the office of resident representative and the office of indigenous inhabitant representative by three months i.e. from 1 July 2003 to 1 October 2003. There is also a need to extend the term of serving VRs by six months, instead of the previously proposed three months. Accordingly, the term of the new VRs has to be reduced by six months, instead of the previously proposed three months. For the same reason, the term of serving members and office holders of a RC and Heung Yee Kuk would need to be extended by six months, instead of the previously proposed three months. The Administration would move CSAs to clause 7(1)(a), clause 62 and clause 63(1) accordingly.

Date of commencement of the Bill

90. Clause 1 provides that the Village Representative Election Ordinance shall come into operation on a day to be appointed by the Secretary for Home Affairs by notice published in the Gazette.

91. The Administration has advised that the day of operation of sections 2 and 19 of Schedule 4 to the Bill shall align with the term of office of the VRs elected under the Ordinance in 2003. Sections 2 and 19 of Schedule 4 seek to repeal section 35(5)(a) of the Sex Discrimination Ordinance in respect of discrimination in eligibility to vote for and to be elected or appointed to advisory bodies, and to amend the meaning of VRs who will be eligible to be elected as Special Councillors of Heung Yee Kuk under section 3(3) of the Heung Yee Kuk Ordinance respectively. The Administration will therefore move a CSA to amend clause 1 to the effect that sections 2 and 19 of Schedule 4 shall come into operation on 1 October 2003 while the rest of the Bill will come into operation on its gazettal so that preparation work for the elections of VRs can commence immediately.

Subsidiary legislation

92. Clauses 65 and 67 of the Bill empower the Secretary for Home Affairs to make regulations for the purposes of the Bill and to amend Schedule 1, 2 or 3.

3. Clause 66 empowers the Chief Justice to make rules for the purposes of the election petitions.

93. The Administration has informed the Bills Committee that the following five pieces of subsidiary legislation would be tabled at the Council for negative vetting after enactment of the Bill -

- (a) regulations to be made by the EAC for the purposes of the procedures for the conduct of the elections of VRs;
- (b) regulations to be made by the EAC for electors registration for the elections of VRs;
- (c) regulations to be made by the Secretary for Home Affairs for the mechanism to appeal to the Revising Officer;
- (d) rules to be made by the Chief Justice for election petitions; and
- (e) maximum amount of election expenses to be set by the Chief Executive in Council.

Committee Stage amendments

94. Apart from the CSAs discussed in paragraphs 44, 60, 76, 80, 87, 89 and 91 above, the Administration has proposed some technical amendments to the Bill. The Bills Committee does not object to these CSAs.

95. Hon Albert CHAN has indicated that he would move CSAs to delete the “residency-in-village” requirements for registration as an elector and for nomination as a candidate in a Resident Representative election, and to amend the functions of an Indigenous Inhabitant Representative (paragraphs 59 and 67 above refer).

Follow-up actions by the Administration

96. The Administration has undertaken -

- (a) to consider making the maps of Existing Villages available on the website of the Home Affairs Department for the 2007 elections of VRs (paragraph 23 above refers);

- (b) to review the subsidies to village offices and RCs through normal resource allocation procedures (paragraph 73 above refers);
- (c) to examine the issue of extending the period preceding the end of the current term of office of the VR concerned for which no village by-election to fill a vacancy would need to be held as well as the same period for similar requirement for holding DC or LegCo by-elections in the review of rural elections to be conducted after the 2003 VR elections (paragraph 77 above refers); and
- (d) to raise the matter of reviewing the Chinese version of clause 13(3)(b), as well as section 29(7)(b) of the District Councils Ordinance and section 48(7)(b) of the Legislative Council Ordinance, with the Department of Justice and the Constitutional Affairs Bureau for future review (paragraph 85 above refers).

97. Members have requested the Administration to reconsider in future review whether clause 10(2) as presently worded and similar provisions in the District Councils Ordinance and the Legislative Council Ordinance have adequately reflected the policy intention of requiring the receipt of the original of the signed notice of resignation (paragraph 83 above refers).

Recommendations

98. Subject to the CSAs to be moved by the Administration, the Bills Committee supports the resumption of the Second Reading debate on the Bill on 12 February 2003.

Consultation with the House Committee

99. The Bills Committee reported to the House Committee on 24 January 2003. The House Committee did not raise objection to the resumption of the Second Reading debate on the Bill on 12 February 2003.

Council Business Division 2
Legislative Council Secretariat
7 February 2003

Bills Committee on Village Representative Election Bill

Membership List

Chairman	Hon IP Kwok-him, JP
Members	Dr Hon David CHU Yu-lin, JP Hon CHAN Kwok-keung Hon Andrew WONG Wang-fat, JP Hon WONG Yung-kan Hon LAU Wong-fat, GBS, JP Hon Andrew CHENG Kar-foo Hon TAM Yiu-chung, GBS, JP Dr Hon TANG Siu-tong, JP Hon Tommy CHEUNG Yu-yan, JP Hon Albert CHAN Wai-yip Hon WONG Sing-chi (Total : 12 Members)
Clerk	Miss Flora TAI Yin-ping
Legal Adviser	Mr Stephen LAM Ping-man
Date	22 October 2002

Bills Committee on Village Representative Election Bill

**List of the organisations and individuals which/who have made submission
to the Bills Committee**

Organisations/individuals which/who have provided their views in person

1. Association of New Territories Indigenous Residents
2. Hang Hau District Rural Committee
3. Heung Yee Kuk New Territories
4. Ping Shan Rural Committee
5. South Lantau Rural Committee
6. Residents of Yuen Long San Tin Ha Wan Village
7. Mr CHEUNG Yat-fung, Course Tutor of Department of Politics and Public Administration, the University of Hong Kong
8. Mr CHOI Yuet-wing, Vice Chairman of Pat Heung Rural Committee
9. Mr FUNG Ying-cheung, Village Representative of Yuen Long Pok Wai Village
10. Mr KWONG Kam-kwan, Course Tutor of Department of Politics and Public Administration, the University of Hong Kong
11. Ms LIAO Shu-lan, Co-opted Councillor, Heung Yee Kuk
12. Dr LO Shiu-hing, Associate Professor of Department of Politics and Public Administration, the University of Hong Kong
13. Mr MAN Chi-sheung, Village Representative of Yuen Long Tsing Lung Tsuen
14. Mr MAN Fu-wan, Village Representative of Yuen Long Wing Ping Tsuen
15. Mr TANG On-tong, Village Representative of Tsuen Wan Shek Wai Kok Village
16. Mr Benson WONG Wai-kwok, Senior Research Assistant of Department of Politics and Public Administration, the University of Hong Kong
17. Mr YAU Fook-ping, Village Representative of Tai Po Cheung Shu Tan Village
18. Mr YAU Wai-kwan, Village Representative of Fanling Hung Leng Village

Organisations/individuals which/who have provided written submission only

19. Concern Group on New Territories Walled Village Culture
20. Fanling District Rural Committee
21. Mr Robert CHAN
22. Mr C Y CHEUNG, Village Representative of Yuen Long Shan Ha Village
23. Mr CHEUNG Yat-wah, Village Representative of Yuen Long Pat Heung Lui Kung Tin Tsuen
24. Mr HAU Yuet-woon, Village Representative of Sheung Shui Kam Tsin Village
25. Mr LAU Hing-kee, member of Sai Kung District Council
26. Mr LAW Fong-yau, Village Representative of Tai Po Po Sam Pai Village
27. Mr LEE Lam-sang, Village Representative of Sha Tau Kok Sheung Wo Hang Village
28. Mr LOUR Tsang-tsay, member of Sai Kung District Council
29. Mrs TANG LEUNG Fuk-kwan, Village Representative of San Uk Tsuen, Yuen Long
30. Mr WONG Pak-mau, representative of Tai Po Luen Yick Rural Committee
31. Mr YEUNG Wai-sing, member of Eastern District Council
32. 15 Village Representatives who are civil servants
33. 35 Village Representatives in Ping Shan District