

**Bills Committee on  
Legislative Council (Amendment) Bill 2011**

The paper provides the information requested by Members and sets out the Committee Stage Amendments (“CSAs”) to be proposed by the Administration.

**The compilation of a precedence list**

2. The proposed section 58B (originally 58A) of the Legislative Council (Amendment) Bill 2011 (“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 geographical constituency (“GC”) or the District Council (second) functional constituency (“DC (second) FC”) by the Returning Officer. The precedence list under the Bill is to consist of names of the following persons-

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

3. We will propose CSAs to further specify that the precedence list should also consist of names of the following persons-

- (c) 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)); and
- (d) names of the persons determined by the CFI or the CFA that should be added on the list (proposed section 58B(6)).

4. Under the proposed section 58B(3), 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(2)(a), a person who is a candidate from a list of candidates with

candidates unelected 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(2)(b), 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 sections 58B(6) and 58B(6A), if a precedence list published by the Returning Officer 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 Returning Officer must announce the revision and published the list as revised.

### **The replacement mechanism**

5. The proposed section 35A of the Bill provides a replacement mechanism for filling of vacancy in membership of GC and DC (second) FC. If a Member returned for any GC or DC (second) FC becomes vacant otherwise than within 4 months preceding the end of the Legislative Council (“LegCo”)’s current term of office; and there is a precedence list for that constituency, the Returning Officer 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 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. If the Returning Officer receives a confirmation from the person and 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 becomes a Member and upon the declaration the person becomes a Member. If a vacancy in the membership of the 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.

6. 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 vacancy is not filled by the operation of the replacement mechanism, the Returning Officer must publicly declare that the vacancy is not filled by publishing the declaration in the Gazette and a by-election should be held.

## **Election petitions extend to cover the precedence list**

7. Clause 8 of the Bill provides that an election petition may be lodged concerning a precedence list of candidates compiled by the Returning Officer under the proposed section 58B.

8. Under the proposed section 61(2A), a petition may be lodged against the decision of a Returning Officer 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), i.e.-

- (a) that 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) that 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) that corrupt or illegal conduct was generally prevalent at or in connection with the relevant election;
- (d) 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; and
- (e) a ground specified in any other enactment that enables an election to be questioned<sup>1</sup>.

9. Regarding the respondent to an election petition against a precedence list under the proposed section 61(2A) and 61(2B), the person whose name or ranking on a precedence list is questioned by an election petition or the Returning Officer who published the list may be made a respondent to the petition. In the event that the exclusion of a person from a precedence list is questioned, the Returning Officer who published the list may be made a respondent to the petition. The period within which an election petition questioning the precedence list may be lodged is 2 months following the date of the publication of the list, which is set out in the proposed section 65(2).

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<sup>1</sup> Added in the CSA to Clause 8.

10. As a result of the extension of election petitions over the precedence list, clause 11 of the Bill proposes to add sections 67(2A) and 67(2B) to the effect that-

- (a) 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, the CFI must determine whether the name is to be included in the list; and
- (b) at the end of the trial of an election petition that relates to the ranking of a person on a precedence list, the CFI must determine whether the ranking of the person on the list is correct and, if not correct, what is the correct ranking.

11. Without compromising the effect of sections 67(1) and 67(2) and the proposed sections 67(2A) and (2B), we will propose further CSAs to the Bill that in determining an election petition which concerns a precedence list compiled by the Returning Officer, the CFI must determine whether the person whose election is questioned was or was not duly elected and if not duly elected, determine-

- (a) whether some other person (whether in or not in the precedence list) was duly elected instead; or
- (b) whether a by-election is to be held to fill the vacancy that arises as a result (clause 11 of the CSAs).

12. As the CFA has earlier declared the finality provision in section 67(3) of the Legislative Council Ordinance (Cap. 542) as unconstitutional and invalid, we have proposed in the Electoral Legislation (Miscellaneous Amendments) Bill 2011 that a leap-frog appeal mechanism would be introduced so that an appeal against the determination of the CFI could be made to the CFA direct. As such, we will propose CSAs to the Bill to give the powers for the CFA to determine-

- (a) in the event that an election was contested and the person was not duly elected, whether some other person (whether in or not in the precedence list) was duly elected instead or a by-election is to be held to fill the vacancy that arises as a result (clause 11 of the Bill and CSAs);

- (b) if the election petition relates to the inclusion of the name of a person in, or the exclusion of the name of a person from a precedence list, whether the name is to be included in the list (new clause of the Bill which amends section 70B in the Electoral Legislation (Miscellaneous Amendment) Bill 2011); and
- (c) if the election petition relates to the ranking of a person on a precedence list, whether the ranking of the person on the list is correct and if not correct, what is the correct ranking (new clause of the Bill which amends section 70B in the Electoral Legislation (Miscellaneous Amendment) Bill 2011).

13. We trust that the powers set out above are sufficient to enable the court to deal with such election petition cases with a broad discretion.

14. Our proposed CSAs to the Bill are at the Annex.

Constitutional and Mainland Affairs Bureau  
June 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(2)	By deleting everything before “into” and substituting—  “(2) Sections 3, 4, 5, 6, 8, 9, 10, 11, 11A, 12, 13, 14 and 15 come”.
3	In the proposed section 12(3), by deleting “sections 13 and” and substituting “section”.
5	(a) In the proposed section 35A(1), by deleting “This” and substituting “Subject to sections 67(2)(b) and sections 70B(a)(ii)(B), this”.  (b) In the proposed section 35A(1)(a), by adding “or 72” after “15”.  (c) In the proposed section 35A(5), by deleting “that the person becomes” and substituting “that the person has been elected as”.  (d) By deleting the proposed section 35A(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 an election,

if the context of the provision, having regard to the purpose of the provision, so requires.”.

- (e) In the proposed section 35A(11), by deleting “58A” and substituting “58B”.

6 By adding after subclause (2)—

“(3) Section 36(1)(e)—

**Repeal the full stop**

**Substitute a semicolon.**

(4) After section 36(1)(e)—

**Add**

“(f) on the Court’s making a determination under section 67(2)(b) or the Court of Final Appeal’s making a determination under section 70B(a)(ii)(B) that a by-election is to be held.”.”.

7 (a) In the clause 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)(a)(ii), by deleting “and”.
- (f) In the proposed section 58B(2)(b), by deleting the full stop and substituting “; and”.
- (g) In the proposed section 58B(2), by adding after paragraph (b)—
  - “(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 that list of candidates was less than that obtained by another list of candidates or other lists of candidates, the name of that candidate.”.
- (h) In the proposed section 58B(4)(b), by deleting the full stop and substituting a semicolon.
- (i) In the proposed section 58B(4), by adding after paragraph (b)—
  - “(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 that person appears on the precedence list.”.

(j) In the proposed section 58B(6), by adding after paragraph

(a)—

“(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;”.

(k) In the proposed section 58B(6)(b), by deleting “and”.

(l) In the proposed section 58B(6), by adding after paragraph

(b)—

“(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(2B) or 70B(a)(iv) that a particular ranking of a person on the list is correct, revised by reflecting that ranking; and”.

(m) In the proposed section 58B, by adding after subsection

(6)—

“(6A) If a precedence list published under subsection (1) is revised under subsection (6) or section 35A(7), the Returning Officer must, by notice in the Gazette—

(a) announce the revision; and

(b) publish the list as revised.”.

(n) In the proposed section 58B(7), by deleting “(a) or (b)”.

(o) In the proposed section 58B, by deleting subsections (8)

and (9).

- 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”.
- (c) In the proposed section 61(2B)(c), by deleting “and”.
- (d) In the proposed section 61(2B)(d), by deleting the full stop and substituting “; and”.
- (e) In the proposed section 61(2B), by adding—
- “(e) a ground specified in any other enactment that enables an election to be questioned.”.
- 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(2) In the proposed section 65(2)(a), (b) and (c), by deleting “58A” and substituting “58B”.
- 11 (a) By renumbering the clause as clause 11(2).
- (b) By adding before subclause (2)—
- “(1) Section 67(2)—

**Repeal**

everything after “,determine”

**Substitute**

“whether—

- (a) some other person (whether or not that other person is on a precedence list published under section 58A) was duly elected instead; or
- (b) a by-election is to be held to fill the vacancy that arises as a result.”.
- (c) In subclause (2), in the proposed section 67(2A), by deleting “58A” and substituting “58B”.
- (d) In subclause (2), in the proposed section 67(2B), by deleting “58A” and substituting “58B”.

New By adding after clause 11—

**“11A. Section 70B amended (Court of Final Appeal’s determination)**

- (1) Section 70B(a)(ii)(B)—

**Repeal**

“was duly elected in place of the person; and”

**Substitute**

(whether or not the person is on a precedence list published under section 58B) was duly elected instead or a by-election is to be held to fill the vacancy that arises as a result;”.

- (2) After section 70B(a)(ii)—

**Add**

- “(iii) 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; and

- (iv) 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; and”.”.