

LEGISLATIVE COUNCIL BRIEF

LEGISLATIVE COUNCIL (AMENDMENT) BILL 2011

INTRODUCTION

A At the meeting of the Executive Council on 31 May 2011, the Council ADVISED and the Chief Executive ORDERED that the Legislative Council (Amendment) Bill 2011, at Annex A, should be introduced into the Legislative Council (“LegCo”).

BACKGROUND AND JUSTIFICATIONS

2. On 17 May 2011, the Government announced the proposal for introducing a replacement arrangement for filling a vacancy arising from resignation of LegCo Members and other situations. On 24 May 2011, the Government consulted LegCo Members at the special meeting of the Constitutional Affairs Panel on the proposed replacement arrangement. The proposal is as follows –

- (a) a vacancy arising mid-term in the geographical constituencies (“GCs”) and the newly established District Council (second) functional constituency (“DC (second) FC”) seats will be filled by reference to the election result of the preceding general election. The first candidate who has not yet been elected in the list with the largest number of remainder votes in the preceding general election will be returned;
- (b) the replacement arrangement will apply to all situations specified under section 15 of the Legislative Council Ordinance (Cap. 542) (“LCO”) and Article 79 of the Basic Law under which a vacancy of the LegCo arises;

- (c) the replacement arrangement does not apply to traditional functional constituencies (FCs). A vacancy arising mid-term in the FCs (other than the DC (second) FC) will be filled by a by-election; and
- (d) the replacement arrangement specified in (a) and (b) above will be implemented from the fifth term of office.

3. The Bill at Annex A sets out the Government's proposal which is –

- (a) that after a general election, the Returning Officer will publish in the Gazette a notice setting out a list of candidates of the LegCo GCs and the DC (second) FC who are eligible to fill the vacancy in a descending order determined by the number of remaining votes secured by the list of candidates in the general election. The first candidate who has not yet been elected in the list with the largest number of remainder votes will fill a vacancy of the LegCo arising mid-term. If the candidate concerned has died, or is now disqualified or does not wish to serve, the first unelected candidate on the list with the second largest number of remainder votes will fill the vacancy. Where necessary, other candidates on the gazetted list can be approached in sequence to fill the vacancy;
- (b) that if two or more lists in a constituency get the same vote in the general election, the drawing of lots shall be done right after counting so that the order of precedence can be determined;
- (c) that election petitions would be extended to cover the gazetted list of candidates as if they have been returned; and
- (d) that the Electoral Affairs Commission ("EAC") is obliged to hold by-elections to fill the vacancy if the gazetted list of candidates has been exhausted.

THE BILL

4. The main provisions of the Bill are explained below:
 - (a) Clause 1 sets out the short title and provides for the commencement. The proposed mechanism is to be put in place at the commencement of the term of office of the fifth term of the LegCo in 2012;
 - (b) Clause 3 amends section 12 of the LCO to provide for the term of office of a Member of the LegCo who fills a vacancy under the proposed mechanism (i.e. he serves for the remainder of the LegCo term);
 - (c) Clause 4 introduces an amendment to provide that a Member who fills a vacancy under the proposed mechanism accepts office as a Member by a written confirmation sent to the Returning Officer;
 - (d) Clause 5 adds a new section to provide for the operation of the proposed mechanism. If a vacancy arises, the Returning Officer must notify the person who ranks highest in the precedence list prepared for the constituency concerned at the last general election. The persons on the precedence list are candidates in the last general election who were not elected but ranked highest in the lists of candidates they were respectively on at that election. The order of priority of the persons is determined by the number of votes their lists obtained in that election. If the person who ranks highest in the precedence list accepts office and is eligible to become a Member, the person fills the vacancy and becomes a Member. If the person does not accept office or is not eligible to become a Member, the Returning officer must notify the person who ranks next highest on the list. If necessary, the Returning Officer must repeat the process until the vacancy is filled. If the persons on the precedence list are exhausted and the vacancy cannot be filled, a by-election will be held as set out in Clause 6;

- (e) Clause 7 adds a new section to provide for the compilation and publication of a precedence list;
- (f) Clauses 8 to 11 provide that election petitions would be extended to cover the precedence list. A decision made by a Returning Officer as regards the compilation of a precedence list or the eligibility of a person on a precedence list to become a Member may be questioned by an election petition; and
- (g) Clauses 14 to 15 propose amendments to the Electronic Transactions (Exclusion) Order (Cap. 553 sub. leg. B). The effect is that some documents used in relation to the proposed mechanism have to be in paper form.

LEGISLATIVE TIMETABLE

5. The legislative timetable is as follows -

Publication in the Gazette	3 June 2011
First reading and commencement of Second Reading debate	8 June 2011
Resumption of Second Reading debate, Committee Stage and Third Reading	To be notified

IMPLICATIONS OF THE PROPOSALS

6. The Government considers that the legislative proposal is in conformity with the Basic Law, including the provisions concerning human rights. The amendments proposed in the Bill will not affect the current binding effect of the Ordinance. The Bill has no economic, sustainability, environmental or productivity implications.

7. The proposal to fill any vacant GC or DC(second) FC seats by reference to the election result of the preceding general election will obviate the need for arranging by-elections for the vacancies. Implementation of the proposal does not require additional financial and civil service resources.

PUBLIC CONSULTATION

8. We announced our proposal for introducing a replacement arrangement for filling a vacancy arising from resignation of LegCo Members and other situations on 17 May 2011. We consulted the LegCo Members at the special meeting of the Constitutional Affairs Panel held on 24 May 2011.

PUBLICITY

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

ENQUIRY

10. Any enquiry on this brief can be addressed to Mrs. Anne Teng, Principal Assistant Secretary for Constitutional And Mainland Affairs at 2810 2908.

Constitutional and Mainland Affairs Bureau
31 May 2011

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A BILL To

Amend the Legislative Council Ordinance to provide for the filling of any vacancy in the membership of the Legislative Council in any geographical constituency or the District Council (second) functional constituency by a replacement mechanism in certain circumstances and to make related amendments to the Electronic Transactions (Exclusion) Order.

Enacted by the Legislative Council.

Part 1

Preliminary

1. Short title and commencement

- (1) This Ordinance may be cited as the Legislative Council (Amendment) Ordinance 2011.
- (2) This Ordinance (except this section and sections 2 and 7) comes into operation on the commencement of the term of office of the fifth term of office of the Legislative Council in 2012.
- (3) This section and sections 2 and 7 come into operation on 1 September 2012.

Part 2

Amendments to Legislative Council Ordinance

2. Legislative Council Ordinance amended

The Legislative Council Ordinance (Cap. 542) is amended as set out in sections 3 to 12.

3. Section 12 amended (How long Members are to hold office)

After section 12(2)—

Add

- “(3) Subject to sections 13 and 15, a person who becomes a Member under section 35A—
- (a) holds office from the date on which the declaration is made under section 35A(5) in relation to the person; and
 - (b) vacates office at the end of the term of office of the Legislative Council during which the declaration is made.”.

4. Section 13 amended (Acceptance of office as a Member)

- (1) Section 13(1)—

Repeal

“A”

Substitute

“Subject to subsection (5), a”.

- (2) After section 13(4)—

Add

- “(5) This section does not apply to a person who accepts office as a Member under section 35A.”.

5. Section 35A added

After section 35—

Add**“35A. Filling of vacancy in membership of Legislative Council: geographical constituencies and District Council (second) functional constituency**

- (1) This section applies if—
 - (a) the office of a Member returned for any geographical constituency or the District Council (second) functional constituency becomes vacant under section 15 otherwise than within the 4 months preceding the end of the Legislative Council’s current term of office; and
 - (b) there is a precedence list for that constituency.
- (2) If the Clerk to the Legislative Council declares under section 35 the existence of a vacancy in the membership of that Council in any geographical constituency or the District Council (second) functional constituency, the Returning Officer appointed for the constituency concerned must comply with subsection (3) in relation to the vacancy.
- (3) The Returning Officer must deliver a notice to the person who ranks highest on the precedence list for the constituency concerned.
- (4) A person to whom a notice is delivered under subsection (3) may, within 7 days after the date on which the notice is delivered, signify his or her acceptance of office as a Member by a written confirmation sent to the Returning Officer.
- (5) If the Returning Officer—
 - (a) receives a confirmation from a person in accordance with subsection (4); and

- (b) determines, upon an inquiry, that the person is eligible to become a Member,
the Returning Officer must, as soon as practicable, publicly declare that the person becomes a Member and upon the declaration the person becomes a Member.
- (6) For the purposes of subsection (5), a person is eligible to become a Member if the person—
 - (a) does not fall within paragraph (a), (b), (c), (g), (h) or (i) of section 39(1);
 - (b) on the date on which the confirmation is sent by the person under subsection (4), is not serving a sentence of imprisonment;
 - (c) does not, had there been an election on the date referred to in paragraph (b) for the constituency concerned, fall within paragraph (f) of section 39(1);
 - (d) has not been convicted in the manner set out in subparagraph (i), (ii), (iii) or (iv) of section 39(1)(e) after the last election conducted for the constituency concerned; and
 - (e) has not been found under the Mental Health Ordinance (Cap. 136) to be incapable, by reason of mental incapacity, of managing and administering his or her property and affairs.
- (7) If a vacancy in the membership of the Legislative Council is not filled by a person to whom a notice is delivered under subsection (3)—
 - (a) the precedence list for the constituency concerned is revised by removing the name of the person from the list; and
 - (b) the Returning Officer must comply with subsections (3) and (5) in relation to the vacancy and to the list as revised.

- (8) For all purposes of any Ordinance—
- (a) a person who becomes a Member under subsection (5) is to be regarded as a Member elected as such;
 - (b) the process through which the person becomes a Member under this section is to be regarded as an election; and
 - (c) the declaration made in relation to the person under subsection (5) is to be regarded as a declaration that the person has been elected as a Member.
- (9) If a vacancy in the membership of the Legislative Council to which this section applies is not filled by the operation of the preceding subsections of this section, the Returning Officer must publicly declare that the vacancy is not filled under this section.
- (10) A Returning Officer who makes a declaration under subsection (5) or (9) must publish the declaration in the Gazette.
- (11) In this section, a reference to a precedence list for a constituency means a precedence list published under section 58A in relation to that constituency following the last election conducted for that constituency.
- (12) For the purposes of subsection (3)—
- (a) if there is only one person on a precedence list, the person is regarded as ranking highest on the list; and
 - (b) a person on the list who is for the time being a Member is to be regarded as not being on the list.”.

6. Section 36 amended (By-election to be held to fill vacancy in membership of Legislative Council)

- (1) Section 36(1)(a), before “on the”—
Add

“unless section 35A applies,”.

- (2) After section 36(1)(a)—

Add

“(aa) on the making of a declaration under subsection (9) of section 35A that a vacancy in the membership of the Legislative Council is not filled under that section;”.

7. Section 58A added

After section 58—

Add

“58A. Precedence list for geographical constituencies and District Council (second) functional constituency

- (1) The Returning Officer appointed for a geographical constituency or the District Council (second) functional constituency must, as soon as practicable after the completion of the counting of votes in respect of a general election—
 - (a) compile a precedence list for that constituency in accordance with subsections (2), (3), (4) and (5); and
 - (b) publish the list by notice in the Gazette.
- (2) A precedence list compiled under subsection (1) for a constituency is to consist of—
 - (a) where any list of candidates for that constituency in the relevant general election has obtained any number of valid votes but has no candidate who is duly elected in that election, the name of—
 - (i) if there is only one candidate on the list of candidates, the only candidate; or

- (ii) if there are 2 or more candidates on the list of candidates, the candidate who ranks first on the list of candidates; and
- (b) where any list of candidates for that constituency in the relevant general election—
 - (i) has any candidate who is duly elected in that election;
 - (ii) has any candidate who is not duly elected in that election; and
 - (iii) has any remaining number of votes which did not return a candidate under section 49(8)(a),
the name of the candidate who is not duly elected and who ranks immediately after the candidate who is, or the candidates who are, duly elected on the list of candidates.
- (3) Subject to subsection (5), on a precedence list the names of the persons 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.
- (4) For the purposes of subsection (3)—
 - (a) a person who is a candidate referred to in subsection (2)(a)(i) or (ii) is to be regarded as having the votes obtained by the list of candidates in which the name of the person appears;
 - (b) a person who is a candidate referred to in subsection (2)(b) is to be regarded as having a number of votes that is equal to the remaining number of votes referred to in subsection (2)(b)(iii) obtained by the list of candidates in which the name of the person appears.
- (5) If 2 or more persons have the same number of votes under subsection (4), the Returning Officer must

- determine the order of priority of those persons on the precedence list by drawing lots.
 - (6) A precedence list published under subsection (1)—
 - (a) is, if any person whose name is included in the list becomes a Member under section 35A, revised by removing that name from the list;
 - (b) is, if any person whose name is included in the list dies, revised by removing that name from the list; and
 - (c) is also revised in the circumstances specified in section 35A(7)(a).
 - (7) If all the names included in a precedence list published under subsection (1) have been removed from the list under subsection (6)(a) or (b) or section 35A(7), the list ceases to exist for the purposes of this Ordinance.
 - (8) A precedence list published for a constituency ceases to exist for the purposes of this Ordinance upon the publication of another precedence list for that constituency during the same term of office of the Legislative Council.
 - (9) If a by-election is conducted for any geographical constituency or the District Council (second) functional constituency, this section applies as if each reference in this section to a general election is substituted by a reference to that by-election.”.
- 8. Section 61 amended (Election may be questioned only by election petition made on specified grounds)**
- (1) Section 61, heading, after “**Election**”—
Add
“**etc.**”.
 - (2) After section 61(1)(a)(i)—

Add

“(ia) (in the case of a person who becomes a Member under section 35A) the person is not eligible to become a Member under section 35A(6); or”.

(3) After section 61(2)—

Add

“(2A) A decision of a Returning Officer under section 58A as to—

- (a) whether to include the name of a person in a precedence list; or
 - (b) the ranking of a person on a precedence list,
- may be questioned only by an election petition lodged under section 62 on any of the grounds specified in subsection (2B).

(2B) The grounds are—

- (a) the ground 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) the ground 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) the ground that corrupt or illegal conduct was generally prevalent at or in connection with the relevant election; and
- (d) the ground that material irregularity occurred in relation to—
 - (i) the relevant election;
 - (ii) the polling or counting of votes at the relevant election; or

(iii) the compilation of the precedence list.”.

9. Section 63 amended (Who may be made respondent to election petition)

After section 63(1)—

Add

“(1A) If—

- (a) the inclusion of the name of a person in a precedence list published under section 58A; or
 - (b) the ranking of a person on a precedence list published under section 58A,
- is questioned by an election petition, the person and the Returning Officer who published the list may be made a respondent to the petition.

(1B) If the exclusion of the name of a person from a precedence list published under section 58A is questioned by an election petition, the Returning Officer who publish the list may be made a respondent to the petition.”.

10. Section 65 amended (Period within which election petition is to be lodged)

(1) Section 65—

Renumber the section as section 65(1).

(2) After section 65(1)—

Add

“(2) An election petition questioning—

- (a) the inclusion of the name of a person in a precedence list published under section 58A;
- (b) the exclusion of the name of a person from a precedence list published under section 58A; or

- (c) the ranking of a person on a precedence list published under section 58A,
may be lodged only during the period of 2 months following the date on which the list is published.”.

11. Section 67 amended (Court to determine election petition)

After section 67(2)—

Add

- “(2A) 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 published under section 58A, the Court must determine whether the name is to be included in the list.
- (2B) At the end of the trial of an election petition that relates to the ranking of a person on a precedence list published under section 58A, the Court must determine whether the ranking of the person on the list is correct and, if not correct, what is the correct ranking.”.

12. Section 78 amended (Appointment of Returning Officers and assistants)

Section 78(1)—

Repeal

everything after “Commission to be”

Substitute

“necessary—

- (a) to enable an election to be held in the constituency;
and
(b) for the operation of section 35A.”.

Part 3

Amendments to Electronic Transactions (Exclusion) Order

13. Electronic Transactions (Exclusion) Order amended

The Electronic Transactions (Exclusion) Order (Cap. 553 sub. leg. B) is amended as set out in sections 14 and 15.

14. Schedule 1 amended (Provisions excluded from application of section 5 of Ordinance)

Schedule 1, item 60, column 3, after “26(6)”—

Add

“, 35A(3) and (4)”.

15. Schedule 2 amended (Provisions excluded from application of section 6 of Ordinance)

Schedule 2, item 19, column 3, after “14(2)”—

Add

“, 35A(3) and (4)”.

Explanatory Memorandum

The object of this Bill is to introduce a replacement mechanism under which a vacancy in the membership of the Legislative Council arising during the term of office of the Legislative Council in any geographical constituency or the District Council (second functional constituency) is filled by a person from a precedence list compiled in the last general election.

2. Clause 1 sets out the short title and provides for commencement. The proposed mechanism is to be put in place at the commencement of the term of office of the fifth term of office of the Legislative Council in 2012.
3. Clause 3 amends section 12 of the Legislative Council Ordinance (Cap. 542) (*the principal Ordinance*) to provide for the term of office of a Member of the Legislative Council (*Member*) who fills a vacancy under the proposed mechanism.
4. Clause 4 introduces a consequential amendment to section 13 of the principal Ordinance.
5. Clause 5 adds a new section to the principal Ordinance to provide for the operation of the proposed mechanism. If a vacancy arises, the Returning Officer must notify the person who ranks highest on the precedence list prepared for the constituency concerned in the last election. The persons on the precedence list are candidates in the last election who were not elected but ranked highest among the candidates who were not elected on the lists of candidates they were respectively on in that election. The order of priority of the persons is determined by the number of votes their lists obtained in that election.
6. If the person who ranks highest on the precedence list accepts office and is eligible to become a Member, the person fills the vacancy and becomes a Member. If the person does not accept office or is not eligible to become a Member, the Returning officer must notify the person who ranks next highest on the list. If

necessary, the Returning Officer must repeat the process until the vacancy is filled. If the persons on the precedence list are exhausted and the vacancy cannot be filled, a by-election will be held (see clause 6).

7. Clause 7 adds a new section to the principal Ordinance to provide for the compilation and publication of a precedence list.
8. Clauses 8 to 11 introduce amendments to the provisions in the principal Ordinance which relate to an election petition. A decision made by a Returning Officer as regards the compilation of a precedence list or the eligibility of a person on a precedence list to become a Member may be questioned by an election petition.
9. Clause 12 introduces an amendment to reflect the new responsibility of Returning Officers under the proposed mechanism.
10. Clauses 14 and 15 propose amendments to the Electronic Transactions (Exclusion) Order (Cap. 553 sub. leg. B). The effect is that some documents used in relation to the proposed mechanism have to be in paper form.

Details of the Proposed Replacement Arrangement

- (a) After a general election, the Returning Officer will publish in the Gazette a notice setting out a precedence list of candidates for each GC and the DC (second) FC respectively. The precedence list will show the candidates who are eligible to fill a vacancy in the constituency concerned in a descending order. The precedence list will be compiled on the following basis –
 - (i) the first candidate who was not returned at the preceding general election in each list of candidates which has remainder votes (i.e. votes that were not enough to enable the candidate to be returned at the preceding general election) will be included in the precedence list;
 - (ii) amongst the candidates mentioned in sub-paragraph (i) above, the candidate in the list of candidates which has the largest number of remainder votes will be the first candidate in the precedence list;
 - (iii) the candidate in the list of candidates which has the second largest number of remainder votes will be the second candidate in the precedence list. The order of any other candidates in the precedence list will be determined on the same basis.
- (b) If two or more lists of candidates in a constituency get the same number of remainder votes in the general election, the drawing of lots will be done right after counting so that the order of precedence can be determined.
- (c) The existing election petition mechanism will be extended to cover the precedence list as if the candidates in the list have been returned if there are any disputes about the precedence list.
- (d) If a vacancy arises mid-term, the first candidate in the precedence list will fill the vacancy. If the candidate concerned has died, or becomes disqualified or does not wish to take up the seat, the second candidate in the precedence list will fill the vacancy. Where necessary, the other candidates in the precedence list will be approached by the Returning Officer in sequence to fill the vacancy.

- (e) The EAC will hold a by-election to fill the vacancy if the precedence list has been exhausted and there is no candidate on the list to fill the vacancy.