
INFORMATION NOTE

Replacement arrangement for filling vacancies in overseas legislatures

1. Background

1.1 At the meeting of the Panel on Constitutional Affairs held on 24 May 2011, members raised concerns relating to the Administration's proposed arrangement for filling vacancies in the Legislative Council. The Panel agreed to request the Research Division to provide information on selected practices in overseas legislatures studied by the Administration.

1.2 This information note studies the relevant overseas practices, and the key findings are summarized in the **Appendix**. The study focuses on the following issues raised by members at the meeting:

- (a) proportional representation voting system in parliamentary elections; and
- (b) replacement mechanism to return candidates to fill vacant seats arising mid-term.

1.3 This note covers the following legislatures referred to in the Administration's paper:¹

- (a) Bundestag of Germany;
- (b) Sejm of Poland;
- (c) Parliament of Finland;
- (d) Australian Capital Territory Legislative Assembly; and
- (e) Tasmanian House of Assembly.

¹ *Arrangements for filling vacancies in the Legislative Council*. LC Paper No. CS(2)178/10-11(01), pp.4-5, paragraphs 10-11.

2. Bundestag of Germany

2.1 Germany has a bicameral legislature – the Bundestag ("the lower house") and the Bundesrat ("the upper house").² The Bundestag comprises 598 Members elected every four years.

2.2 Members of the Bundestag are elected through a combination of direct election and proportional representation, under which each voter shall have two votes. The first vote is for electing a candidate in one of the 299 single-mandate constituencies, while the second vote is cast for a party list ("Land list") of one of the 16 Federal states ("Länder"). Candidates are allowed to take part in both types of elections.

2.3 Only political parties can submit Land lists, in which the names of candidates should be in a recognisable order. On the other hand, nomination for constituency candidates can be made by political parties or individuals.

2.4 All Germans shall be eligible to vote provided that they reach the age of 18, have had a domicile or have been permanently resident in the nation for at least three months, and are not disqualified from voting under the *Federal Elections Law*.

2.5 Being appointed by the Federal Minister of the Interior, the Federal Returning Officer is responsible for preparing and conducting Bundestag elections and European elections.

Voting System

2.6 Seats are allocated to candidates in two tiers. Half of the seats are allocated to candidates who receive the most first votes in the constituencies.

² The Bundesrat is made up of 69 Members appointed by the state governments and subject to be recalled at any time.

2.7 The remaining seats shall be allotted through the following steps:

- (a) determining each party's proportional representation in the Bundestag: the total of Bundestag seats shall be distributed among political parties with reference to their valid second votes received nationwide using the Sainte-Laguë/Schepers method.³ Only parties with at least five percent of the second votes at the national level, or having members elected directly in three constituencies, shall be considered in this distribution;
- (b) allotting seats to Land lists: each party's allotted seats shall be distributed among the 16 Länder in proportion to the second votes received by each Land list of that party;
- (c) adjusting the seat number: the allotted seats for each Land list shall be reduced by the number of constituency seats gained by that party in the corresponding state ("Land"), i.e. seats gained by the first vote; and
- (d) allocating seats to candidates: the remaining seats for each Land list shall be filled up by the listed candidates according to their order.

2.8 Parties can keep the constituency seats which exceed the entitled number of seats calculated based on the share of the second votes. These excessive seats are regarded as 'overhang mandates', and there were 24 overhang mandates arising from the latest election in 2009.⁴

³ The total number of Bundestag seats used in calculation shall exclude the number of successful constituency candidates without a Land list (independent candidates) and successful constituency candidates whose parties do not meet the 5% threshold. The second votes of voters who cast their first votes to successful constituency candidates without a valid Land list shall not be considered in calculation.

⁴ In July 2008, the German Federal Constitutional Court ruled that the *Federal Electoral Law* is unconstitutional, in respect of an effect known as 'negative vote weight' which may arise in connection with overhang mandates. This effect refers to the possibility that winning more second votes may cause a party to lose a seat instead. The Court has ordered the Parliament to change the system by 30 June 2011.

Replacement mechanism

2.9 Under Article 48 of the *Federal Electoral Law*, when a Bundestag's seat becomes vacant, it shall be filled by a candidate from the Land list of a party for which the withdrawing Member stood at the election.

2.10 This rule shall not apply if the party has already gained overhang mandates in the Land concerned. Candidates who have resigned from the party after the Land list was drawn up, become a member of another party, have refused membership after being elected in the constituency or resigned as a Member of the Bundestag shall not be considered as replacement. If the Land list is exhausted, the seat shall remain vacant.

2.11 The Land Returning Officer is responsible for deciding which candidate from the Land list should fill up the seat. He shall notify the successor who needs to reply in writing his or her decision on accepting the seat within a week.

2.12 If the withdrawing Member was elected as a constituency Member for a voter group or a party without a valid Land list, a replacement election shall be held in the constituency, unless a new Bundestag will be elected within six months.

3. Parliament of Poland

3.1 The Polish Parliament is bicameral, comprising the Sejm ("the lower house") and the Senate ("the upper house"). The Sejm has 460 Members who are elected for a four-year term by a proportional representation system.⁵

⁵ The Senate comprises 100 Senators who are directly elected from 40 constituencies based on a first-past-the-post majority system. A by-election shall be conducted if a Senate seat becomes vacant, unless it is within six months prior to the last day for ordering the election of the Sejm. According to the Polish Constitution, any shortening of the Sejm's term of office, which may arise by a resolution of the Sejm, will simultaneously mean a shortening of the Senate's term of office.

3.2 Seats are allocated to the 41 constituencies in proportion to their population, with seven to 19 seats per constituency. To take part in the election, election committees representing political parties, coalitions or groups of voters in the election draw up their constituency lists, with the number of candidates not less than the number of seats allocated to the constituency and not exceeding twice of that number.

3.3 Voters shall select a candidate on the ballot paper by which the vote will be attributed to the corresponding constituency list. Such vote will also be counted as an indication of priority for the candidate in seat allocation.

3.4 In general, Polish citizens are entitled to vote from the age of 18.⁶ Parliamentary election in Poland is organised and supervised by the National Electoral Commission and its lower bodies. The Commission is a permanent body consisting of nine judges from different courts.

Voting System

3.5 Seats are allotted proportionally among constituency lists based on the d'Hondt system.⁷ The allotted seats for each constituency list shall then be distributed among the listed candidates according to their rankings determined by the votes received.

3.6 Only election committees of political parties which obtain at least 5% (8% for coalitions) of the total valid votes cast nationally shall be considered in the allocation of seats. This restriction is exempted for election committees of minorities.

⁶ Citizens who are legally incapacitated or deprived of public or electoral rights by a final court decision are not entitled to vote. Those residing permanently or temporarily abroad can apply for inclusion in the voter list.

⁷ The d'Hondt method is a formula which uses the integers 1,2,3,4 and so on to divide the votes cast for each party for seat allocation. The first seat will be allotted to the party with the highest number from the quotients and the remaining seats will be allocated similarly to parties with successive highest numbers.

Replacement mechanism

3.7 The *Parliamentary Election Law* provides that if a Sejm seat becomes vacant, the candidate from the same constituency list who obtained the next highest number of votes in the election shall have the right to fill the vacancy.

3.8 A candidate may give up his or her priority for the seat in favour of another candidate with the next highest number of votes on the same constituency list.⁸ In any case, the Marshal of the Sejm ("the Speaker") shall decide on the replacement arrangement.

3.9 If there is a lack of candidate on the list, the Marshal shall declare such seat to remain vacant until the end of the term.

4. Parliament of Finland

4.1 Finland has a unicameral Parliament with 200 seats. Members of Parliament ("MPs") are elected every four years in general elections. MPs are elected directly and by secret ballot using a proportional system. Every Finnish citizen who has reached the age of 18 by the election date is entitled to vote. Each citizen has one vote.

4.2 The Ministry of Justice has general responsibility for conducting elections. Finland is divided into 15 electoral districts. The number of MPs returned in each electoral district depends on its population, ranging from six to 34 MPs. The province of Åland Islands is an exception in that it always returns one MP.

4.3 Candidates can be nominated by constituency associations or political parties entered in the register maintained by the Ministry of Justice. A constituency association for the nomination of a candidate can be established by at least 100 registered voters in an electoral district. Parties can form electoral alliances and constituency associations can form joint lists. Each electoral alliance or joint list is treated as a single group. This arrangement is designed to improve a group's relative position in elections. In any event, citizens vote for a particular candidate rather than a party.

⁸ To give up the priority to a Sejm's seat, the candidate shall submit a statement of resignation to the Marshal of the Sejm within seven days following delivery of the notification from the Marshal.

Voting system

4.4 Proportionality is intended to ensure that representatives of different parties and groups are included in the Parliament in the same relation as the number of votes received in elections.⁹ The d'Hondt system of proportional representation is used to determine the election results. In the first stage, the total number of votes for each of the following groups in an electoral district is calculated:

- (a) party which does not belong to an electoral alliance;
- (b) electoral alliance;
- (c) joint list; and
- (d) constituency association which does not belong to a joint list.

4.5 In the second stage, the candidates in each group are ranked according to the number of votes each candidate has received.

4.6 In the third stage, each candidate is assigned a comparative index. The candidate with the most votes in each group is accorded an index which equals to the total number of votes received by the group, the index for the candidate ranked second is half of the total votes cast, and the index for the candidate ranked third is a third of the total votes cast, and so on and so forth.

4.7 In the final stage, all candidates in the electoral district are listed in order according to their comparative indices. From this order list, the appropriate number of MPs for the electoral district is elected.

⁹ Parliament of Finland (2008).

Replacement mechanism

4.8 Under Section 92 of the *Election Act*, the first candidate on the list of a party, electoral alliance or joint list who has not been elected is the deputy representative for that group's MP. If a deputy representative cannot be chosen by this method, the first candidate on the name list in order of the comparative indices who has not been elected will become the deputy representative.

4.9 Section 126 of the *Election Act* provides that if the parliamentary seat becomes vacant, the electoral district committee will give a letter of authorisation to the deputy representative as determined according to Section 92, and this person will replace the former MP.

4.10 If the deputy representative becomes a MP, a new deputy representative will be chosen by the electoral district committee following the same methodology.

5. Australian Capital Territory Legislative Assembly

5.1 The unicameral Australian Capital Territory ("the ACT") Legislative Assembly is the smallest legislature in Australia, which has 17 Members. Legislative Assembly elections are held every four years. Voting is compulsory for every person on the electoral roll. Any person who is 18 years old on or before the polling day and is on the Commonwealth electoral roll with an ACT address has to vote at the elections. Each voter has one vote.

5.2 Elections ACT is an independent statutory authority responsible for conducting elections and referendums for the ACT Legislative Assembly. The ACT is divided into three electorates, in which two are five-Member electorates and one is a seven-Member electorate. Election is not by party list. Voters vote for a particular candidate rather than a party. They mark preferences for candidates in the electorate in the order of their choice by using the numbers 1, 2, 3, 4, 5, 6, 7 and so on. To be formal or valid, the ballot paper must have a number "1" and must not have more than one number "1". The same logic applies to the other candidates in the ranking. Ticks and crosses are not allowed.

5.3 In 2001, electronic voting was introduced into the ACT. Voters may choose to vote electronically or on paper. All paper votes are scanned and the preference numbers on each image are read by the Intelligent Character Recognition software. Electoral officials check the interpretations and make corrections as required. The paper votes are added to the electronic votes to get the result of the election.

Voting system

5.4 The Hare-Clark electoral system is used for the ACT Legislative Assembly elections. This proportional representation system is also known as the "single transferable vote" method. Under this system, each voter has a single vote, which can be transferred from candidate to candidate according to the preferences shown on the ballot paper until all the vacancies are filled.

5.5 Votes are counted according to the preferences indicated on the ballot paper. To be elected, a candidate must obtain a "quota" of votes in an electorate. The formula used to calculate the quota is the "Droop quota", which is calculated by dividing the total number of valid votes by one more than the number of seats, and adding one to the result. Therefore, the quota in the two five-Member electorates is one-sixth of the total valid votes plus one, which is roughly 16.7% of the total valid votes, and the quota in the seven-Member electorate is one-eighth of the total valid votes plus one, which is roughly 12.5% of the total valid votes.

5.6 The first step in counting the votes is to count the number of first preference (i.e. number "1" on the ballot paper). After that, the quota is calculated. The candidate with votes equal to or greater than the quota is elected. If all vacancies are filled, the process ends. Otherwise, surplus votes received by the elected candidates are transferred to the other candidates in the electorate.

5.7 If a candidate has more first preference votes than the quota, the number of votes in excess of the quota is called the "surplus votes". Surplus votes are distributed to the other candidates according to the preferences indicated on the ballot papers. All the ballot papers counted to an elected candidate with a surplus are distributed at a reduced value called a "fractional transfer value", which is calculated by dividing the number of surplus votes by the total number of ballot papers with further preferences shown. After distributing all surplus votes from the elected candidates, the total number of votes counted to each candidate is calculated. Any further candidate with votes equal to or greater than the quota is elected. If there are still vacancies to be filled, surplus votes of the newly elected candidate are distributed again.

5.8 If vacancies remain to be filled after all surplus votes from elected candidates have been distributed, then the candidate with the fewest total votes will be excluded, and his or her votes are distributed to the other candidates according to the preferences shown on the ballot papers.¹⁰ New total votes of each continuing candidate (i.e. candidate who is neither elected nor excluded) are then calculated. Any candidate with votes equal to or greater than the quota is elected. This process of first transferring surplus votes and then excluding the candidate with the fewest votes continues until all vacancies are filled.

Replacement mechanism

5.9 To fill a casual vacancy (vacancy created by the death or resignation of a Member), the ACT Legislative Assembly does not hold a by-election. Instead, the new Member is chosen by recounting the votes received by the vacating Member to establish which candidate is next preferred by those voters who elected the vacating Member.

¹⁰ Votes from excluded candidates are distributed at the value at which they were received by the excluded candidate. While votes received by the candidate as first preference have a value of "1", votes received in the distribution of surplus votes will carry the fractional transfer value.

5.10 Only those candidates who contested the original election and also indicated that they wish to contest the casual vacancy are considered in this process. Since all the preferences shown on the ballot papers were data entered and stored in a database, the recount to fill a casual vacancy can be conducted using a computer programme within minutes. The programme will prompt the electoral official to indicate which candidates are contesting the vacancy. After the names have been entered, the programme will calculate the outcome and print the result.

5.11 The computer programme follows the same steps that would have occurred in a manual count of ballot papers. The first step is to identify those ballot papers that contributed to the election of the vacating Member. The ballot papers are subdivided according to the counts (i.e. rounds of calculating the total votes) at which they were received by the vacating Member.

5.12 The ballot papers of the vacating Member are distributed to those contesting candidates in accordance with the first available preference on each ballot paper.¹¹ Some ballot papers may be exhausted (not be distributed) at this stage as they do not show a valid preference for a contesting candidate. The votes keep the transfer value that they had when they were received by the vacating Member. The exception is those votes received at the count at which the vacating Member was elected. Those ballot papers are allocated a new transfer value because some of the votes had already been transferred to other candidates as the vacating Member's surplus in the original election. The number of votes received by each contesting candidate is then calculated.

5.13 The next step is to determine whether a candidate has enough votes to be elected. To be elected, a candidate must obtain at least 50% plus one (i.e. an absolute majority) of the number of votes counted to all the contesting candidates remaining in the count. If no candidate has an absolute majority, the candidate with the fewest votes is excluded, and his or her votes are transferred to the remaining candidates at their respective transfer values. New total votes are calculated. Such process repeats until a candidate receives an absolute majority of votes.

¹¹ For example, a ballot paper that was marked "1 – Blue, 2 – Vacating Member" would be counted to Blue if Blue is contesting the vacancy; and a ballot paper that was marked "1 – Vacating Member, 2 – Black, 3 – Blue" would be counted to Blue if Blue is contesting the vacancy but Black is not.

5.14 The ACT Electoral Commission regards this method of filling casual vacancies as fast and cost-effective, particularly that all preferences on the ballot papers are captured electronically, enabling count-backs to be determined at the push of a button. Importantly, this method serves to preserve the proportional representation of the ACT's Hare-Clark system, as it enables the voters who elected the vacating Member to choose that Member's replacement. In practice, this always means that a vacating Member of a particular political party has been replaced by a member of the same party, thereby retaining the party balance in the Assembly, which in turn reflects the will of the electorate at the relevant general election.¹² Nevertheless, if there is no candidate of the vacating Member's party available to contest the vacancy, the vacancy will be filled by a candidate from another party or by an independent candidate.

5.15 In the event that it is not possible to fill the casual vacancy through recounting the votes (e.g. if no candidate comes forward to contest the vacancy), under Section 195 of the *Electoral Act*, the Legislative Assembly will appoint a person to fill the vacancy. If the vacating Member was elected as a member of a registered political party, the new Member via such appointment must be of the same political party. If the vacating Member was not a member of a political party (i.e. an independent Member), the person chosen to fill the vacancy cannot be a member of a registered political party in the 12 months prior to filling the vacancy. This method is designed to preserve the proportionality of the multi-Member election outcomes.¹³

5.16 There has been one casual vacancy since the 2008 Legislative Assembly election. Mr Jon Stanhope (representing the Australian Labor Party) resigned from the Legislative Assembly on 16 May 2011. A notice was published in the *Canberra Times* on 20 May 2011 calling for nominations from eligible candidates. At the close of applications on 30 May 2011, six nominations were received. In a recount of ballot papers received by Mr Stanhope at the 2008 election, Mr Chris Bourke from the Australian Labor Party received a majority of preferences. Mr Bourke was officially declared elected to the ACT Legislative Assembly on 1 June 2011.

¹² ACT Electoral Commission (2008a).

¹³ Ibid.

6. Tasmanian House of Assembly

6.1 The Parliament of Tasmania consists of three parts: the Crown, the Legislative Council and the House of Assembly. The two Houses of the Tasmanian Parliament have almost equal powers. Nonetheless, it is a convention that the initiation of legislation resides in the House of Assembly, leaving the Legislative Council to act as a House of review.¹⁴

6.2 The House of Assembly has 25 Members. The House of Assembly elections are held every four years. Tasmania has had compulsory voting since the 1930s, and since 1978 everyone over 18 years of age has had to participate in the voting. Each voter has one vote.

6.3 The Tasmanian Electoral Commission and the Electoral Commissioner have statutory responsibilities for the conduct of elections and referendums. In the House of Assembly elections, Tasmania is divided into five electorates, and each electorate returns five Members. Voters are required to indicate a minimum of five candidate preferences in order to cast a formal or valid vote. Should voters express choices beyond five, the vote is still valid.

Voting system

6.4 The Tasmanian House of Assembly is elected using the Hare-Clark electoral system. This system was adopted in Tasmania in 1897. Under this system, a candidate is elected when his or her total number of votes equals to or exceeds a quota. The formula of the Droop quota is used, i.e. the number of valid votes is divided by one more than the number of seats and then plus one. Since five Members are elected in an electorate, the quota is one sixth or 16.7% of the total number of valid votes.

¹⁴ The Legislative Council has 15 Members. As the Council cannot be dissolved, there is no general election. Elections are conducted on a six-year periodic cycle. Elections for three Members are held in May one year, with elections for two Members held in May the following year and so on and so forth. In the Legislative Council elections, Tasmania is divided into 15 single-Member constituencies. It is an election by an absolute majority through the use of the alternative vote. If any candidate secures first preference votes exceeding half of the total votes, he or she is elected. If no candidate satisfies this condition, the candidate with the fewest votes is excluded, and his or her votes are transferred to the second preference shown on the ballot papers. The process of exclusion is repeated until one candidate secures a majority. Whenever the seat of a Member of the Council becomes vacant by reason other than expiry of the term of office, a by-election will be held to fill the vacancy.

6.5 Under the Hare-Clark system, as aforementioned in the ACT section, in order to be elected, a candidate must receive a quota of votes. Surplus votes are transferred to the next preference at the transfer value calculated for the vote. If no further candidates can reach a quota, the candidate who is the lowest on the poll is excluded, and his or her votes are transferred to the second preferences shown on the ballot papers. These procedures are repeated until all vacancies are filled.

Replacement mechanism

6.6 When a vacancy of the House of Assembly occurs, a new Member is elected by a recount process based on votes cast at the previous general election. By this method, the likelihood of a replacement coming from the same party would be enhanced, and the expense of by-election could be avoided.¹⁵

6.7 Only unsuccessful candidates at the general election are eligible to contest the recount. The recounting process is the same as that of the ACT.

6.8 Nonetheless, unlike the ACT, when all eligible candidates of the vacating Member's party are unavailable, a by-election may be held in Tasmania. Under Section 232 of the *Electoral Act 2004*, if a casual vacancy occurs and none of the candidates who were included in the same registered party as the vacating Member are available to contest the vacancy, the registered officer of that party may, by notice in writing to the Electoral Commissioner no later than 24 hours after the close of nominations for the recount, request that a by-election be held to fill the vacancy. It is noted that this provision has never been invoked.

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16 June 2011
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¹⁵ Parliament of Tasmania (2008).

Appendix

Voting system and replacement arrangement for filling vacancies in overseas legislatures

	Bundestag of Germany	Sejm of Poland	Parliament of Finland	Australian Capital Territory Legislative Assembly	Tasmanian House of Assembly
Threshold/ quota to be elected	5% of second votes for gaining seats by proportional representation. Exemption for parties with three constituency seats.	5% for parties and 8% for coalition. Exemption for minorities.	Not applicable.	Total votes cast in the electorate divided by one more than the number of seats, plus one.	Total votes cast in the electorate divided by one more than the number of seats, plus one.
Counting votes	The first vote determines individual winners based on a first-past-the-post system. The second vote determines parties' allotted seats, which will be distributed to Land list candidates according to their listed order after deducting the parties' seats gained by the first vote.	Candidates are ranked according to the votes received on the constituency list.	Candidates are ranked in the party, electoral alliance or joint list according to the votes cast, and a comparative index is assigned accordingly. All candidates are listed in order of the comparative index, with the top ones elected.	A candidate is elected when reaching the quota of votes. Surplus votes are transferred to the next preference. If no further candidates can reach the quota, the candidate who is lowest on the poll is excluded, and his or her votes are transferred to the next preferences. These procedures are repeated until all vacancies are filled.	A candidate is elected when reaching the quota of votes. Surplus votes are transferred to the next preference. If no further candidates can reach the quota, the candidate who is lowest on the poll is excluded, and his or her votes are transferred to the next preferences. These procedures are repeated until all vacancies are filled.

Appendix (cont'd)

Voting system and replacement arrangement for filling vacancies in overseas legislatures

	Bundestag of Germany	Sejm of Poland	Parliament of Finland	Australian Capital Territory Legislative Assembly	Tasmanian House of Assembly
Transferable vote	No.	No.	No.	Yes, surplus votes are transferred to the next preference at the transfer value calculated for the vote.	Yes, surplus votes are transferred to the next preference at the transfer value calculated for the vote.
Replacement mechanism	Vacancy is filled by the candidate from the Land list of a party for which the withdrawing Member was elected. Replacement election shall be arranged if the withdrawing Member was a constituency candidate without a proper Land list.	Vacancy is filled by the candidate with the next highest vote from the same constituency list.	The first candidate on the list of a party, electoral alliance or joint list who has not been elected is the deputy representative for that group's Member of Parliament. Vacancy is filled by the deputy representative.	Vacancy is filled by recounting the votes received by the vacating Member to establish which candidate is next preferred by those voters who elected the vacating Member. In the event that it is not possible to fill the casual vacancy through recounting the votes, the Legislative Assembly will appoint a person of the same party to fill the vacancy.	Vacancy is filled by recounting the votes received by the vacating Member to establish which candidate is next preferred by those voters who elected the vacating Member. When all eligible candidates of the vacating Member's party are unavailable, a by-election may be held.

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