

立法會

Legislative Council

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Background brief for the Bills Committee on Legislative Council (Amendment) Bill 2012

Purpose

This paper sets out the background of the Legislative Council (Amendment) Bill 2012 ("the Bill") and gives a brief account of the recent discussions held by relevant committees on the Administration's proposed arrangements for filling vacancies in the Legislative Council ("LegCo").

Background

Arrangements for filling vacancies in LegCo

2. On 25 January 2010, a LegCo Member from each of the five geographical constituencies ("GCs") submitted written notice of resignation to the Clerk to LegCo. Pursuant to section 35 of the Legislative Council Ordinance (Cap. 542) ("LCO"), the Clerk to LegCo must, by notice published in the Gazette, declare the existence of a vacancy in the membership of that Council within 21 days after becoming aware of the vacancy. Section 36(1)(a) of LCO further stipulates that the Electoral Affairs Commission ("EAC") must, in accordance with regulations in force under the EAC Ordinance (Cap. 541), arrange for a by-election to be held when the Clerk to LegCo makes a declaration as to the existence of a vacancy in the membership of LegCo.

3. In accordance with section 16 of LCO, a person who ceases to be a Member is, subject to section 39 (When person is disqualified from being nominated as a candidate and from being elected as a Member), eligible for re-election as a Member. The resignation of the five Members took effect on 29 January 2010. EAC conducted a by-election on 16 May 2010 to fill the five vacancies and the five resigned Members were all re-elected.

Proposed restriction on resigning Members from participating in by-elections

4. During the deliberations relating to holding the 2010 LegCo by-election at the meetings of the Panel on Constitutional Affairs ("the CA Panel") held on 10 February, 19 March, 19 April, 18, 30 October 2010, 24 May and 18 June 2011,

some members considered that to prevent abuse of the electoral system, there was a need to amend section 14 of LCO to restrict the condition under which a Member who resigned from one's office could stand for a by-election to fill that vacancy. These members expressed concern that starting from the Fifth LegCo, a District Council (second) Functional Constituency ("DC (second) FC") Member who would be returned from the whole Hong Kong Special Administrative Region ("HKSAR") as a single constituency could also set in motion the need to another by-election by resignation. They called on the Administration to put forward legislative proposals to plug the loophole in the existing arrangements for filling vacancies in LegCo as soon as possible.

5. Some other members considered that the freedom of expression of Members and electors would be infringed if a resigning Member was prohibited by law to stand again in the by-election. These members were of the view that it was the fundamental right of a Member to resign in protest against a policy or practice. The overriding principle was that the Administration must ensure that the right to vote and the right to stand for election as guaranteed under the Basic Law ("BL") would not be compromised.

6. At its meeting held on 10 February 2010, the CA Panel passed a motion expressing the views, among others, that the HKSAR Government should amend LCO to prevent the system regarding the resignation of Members and by-elections from being abused again in future.

Bills Committee on Legislative Council (Amendment) Bill 2011

7. On 8 June 2011, the Administration introduced the Legislative Council (Amendment) Bill 2011 ("the 2011 Amendment Bill") into LegCo. The object of the 2011 Amendment Bill is to provide for the filling of any vacancy in the membership of LegCo arising during the term of office of LegCo in any GC or DC (second) FC" by a replacement mechanism in certain circumstances and to make related amendments to the Electronic Transactions (Exclusion) Order.

8. At the House Committee ("HC") meeting on 10 June 2011, members formed a bills committee to study the 2011 Amendment Bill. The Bills Committee held a total of nine meetings from 17 June 2011 to 3 February 2012.

9. The Chairman of the Bills Committee made a verbal report on the deliberations at the HC meeting on 24 June 2011, indicating that subject to the Committee Stage amendments ("CSAs") to be moved by the Administration, it raised no objection to the resumption of the Second Reading debate on the 2011 Amendment Bill at the Council meeting of 13 July 2011.

10. The Bills Committee held a meeting on 4 July 2011 to receive a briefing from the Administration on its proposed revised replacement mechanism by CSAs. Under the proposed revised replacement mechanism, any vacancy in the membership of LegCo for any GC and DC (second) FC would first be filled by the first candidate who had not been elected on the same list as that of the resigning Member. If that candidate was ineligible or unwilling to fill the seat, the vacancy would be filled by the next candidate on the same list, and so on. When there was no more candidate on the same list who was eligible and willing to fill the vacancy, the vacancy would be filled by reference to the precedence list, i.e. the list of the first candidates who had not been elected on each of the lists with remaining votes at the previous general election, ranked in descending order according to the number of remaining votes of their respective lists. Finally, if the vacancy could not be filled by the above methods, a by-election would be held.

11. While some members expressed support for the revised replacement mechanism, some other members expressed the views that (a) the resigning Member should be restricted from participating in any by-election in the entire remainder of the term; (b) the vacancy concerned should be filled by a candidate on the same list as that of the resigning Member and if the vacancy could not be filled by candidate(s) from the same list, a by-election should be held; and (c) the proposed replacement mechanism should not apply to causal vacancies arising from death, serious illness or other involuntary circumstances. There was a call on the Administration to provide more time to consider members' views and make use of the summer recess to conduct a public consultation exercise on relevant issues. The written report of the Bills Committee was circulated to HC on 4 July 2011.

12. The Administration wrote to the Clerk to LegCo in the afternoon of 4 July 2011 advising that in response to the views of the Bills Committee that the Administration should provide more time to consider members' suggestions and listen to the views of the public, the Administration had decided not to resume the Second Reading debate on the 2011 Amendment Bill at the Council meeting of 13 July 2011 and withdrew the notice given accordingly.

13. On 22 July 2011, the Administration published a Consultation Paper on Arrangements for Filling Vacancies in the Legislative Council for public consultation until 24 September 2011. The Bills Committee held a further meeting on 22 July 2011 to receive a briefing by the Administration on the Consultation Paper.

Consultation Report on Arrangements for Filling Vacancies in LegCo

14. On 20 January 2012, the Administration published the Consultation

Report on Arrangements for Filling Vacancies in LegCo. It was the Administration's latest proposal that -

- (a) a vacancy arising mid-term in a GC, the DC (second) FC or any other FC under section 15 or section 72 of LCO or BL79 would continue to be filled by a by-election;
- (b) a Member returned by a GC, the DC (second) FC or other FCs who had voluntarily resigned from office under section 13 or section 14 of LCO would be prohibited from standing in any by-elections in all GCs, the DC (second) FC and other FCs in the same LegCo term within six months of his resignation; and
- (c) the restriction would not apply to general elections. If the six-month prohibition spans over a current term and the following term of LegCo, the prohibition would not be applicable to the by-elections in the following term of LegCo.

15. The Administration briefed the CA Panel on the Consultation Report and its latest proposal at the special Panel meeting on 31 January 2012. Members noted the Administration's plan to introduce a new bill to implement the latest proposal.

16. On 1 February 2012, the Secretary for Constitutional and Mainland Affairs ("SCMA") wrote to the Chairman of the Bills Committee confirming that a new bill would be introduced, and that the 2011 Amendment Bill would not be further pursued and would be withdrawn. The Bills Committee held a meeting on 3 February 2012 to discuss its scrutiny work and agreed that in view of the Administration's decision to withdraw the 2011 Amendment Bill, there would be no need for the Bills Committee to continue its work and the Bills Committee should report to HC accordingly. At its meeting on 10 February 2012, HC agreed that the Bills Committee be dissolved. Members noted the intention of SCMA to give notice to resume the Second Reading debate on the Bill at the Council meeting of 22 February 2012 for the purpose of withdrawing it.

Issues raised by the CA Panel on the Administration's latest proposal

17. The CA Panel was briefed at its special meeting on 31 January 2012 on the Administration's Consultation Report and its latest proposal. Members noted that under the latest proposal, a resigned Member would be prohibited from standing in any by-election in the same LegCo term within six months of his resignation.

18. Some members supported the latest proposal which, they considered, had struck a right balance between the need to prevent possible abuse of the existing by-election system and the need to protect the right of the Hong Kong people to vote. These members were of the view that the latest proposal should be able to answer the strong call from the community to plug the loophole whereby Members could resign at will in order to trigger a by-election in which they intended to stand and sought to be re-elected. They considered that the proposed mechanism was simple and reasonable, as it only sought to prohibit resigning Members from standing in any by-election within six months of their resignation and would not apply to mid-term vacancies arising from death, serious illness and other involuntary circumstances. These members, however, stressed that the Administration should provide more details of the legal advice about the constitutionality of the latest proposal.

19. Some other members, however, expressed objection to the Administration's latest proposal and concern about its constitutionality. They considered that the proposal was susceptible to legal challenge because apart from the right to stand for election, it would still compromise a person's right to vote if the Member who resigned could not stand again in the by-election but that Member was his choice. Furthermore, the proposal could not address the alleged mischief because other members of the same political party of the resigning Members or people who shared their political views could still stand in a by-election. Public expenditure would need to be incurred for the holding of the by-election. These members were of the view that there was nothing inappropriate for Members to be able to resign in order to trigger a by-election in which they sought to stand, and the electorate should be allowed to express their support or otherwise for such an action by exercising the right to vote in the by-election. The existing arrangement for filling a vacancy in LegCo through a by-election should therefore be retained.

20. According to the Administration, in examining the constitutionality of the latest proposal, BL26, which stipulated that permanent residents of HKSAR had the right to vote and the right to stand for election in accordance with law, had to be read in conjunction with BL68 and Annex II to BL, which provided LegCo with a broad discretion in determining the contents of legislation which governed the specific method for forming LegCo. Restrictions could be imposed on the right so long as they were proportionate to a legitimate aim. Having regard to the above, the Department of Justice had come to the conclusion that the latest proposal was constitutional. Although the Administration's latest proposal would not entirely prevent any Member from resigning at will to trigger by-election, a more restrictive proposal would compromise the right to vote. The latest proposal was a compromise among the different views expressed during the public consultation exercise and concerns about the need to preserve the right to vote. Although the latest

proposal would not entirely prevent a Member from resignation to trigger by-election, it could have considerable effect in preventing a Member from doing so as he would consider the consequences of the act.

21. Some members observed that according to the Consultation Report, there were many respondents who supported maintaining the status quo but only a low percentage of respondents who supported Option 1, which proposed restricting resigning Members from participation in any by-election in the same term. Many professional bodies also supported maintaining the status quo. They queried how the Administration could conclude that in general over or close to 50% of the respondents to opinion polls considered that the Government should take steps to address the resignation of Members to trigger by-election.

22. According to the Administration, the views received during the public consultation period indicated that there was a strong support for the Administration to address the mischief arising from Members resigning at will in order to trigger by-elections. Although there was no overwhelming support for any of the options in the Consultation Report, it could be noted that Option 1 received more support than the other three options. The Administration's latest proposal, which prohibited a resigned Member from standing in any by-election for a period of six months as compared to any by-election in the same LegCo term under Option 1, had struck a right balance among the diverse views expressed during the consultation exercise and concerns about the need to protect the right to vote.

Relevant papers

23. A list of the relevant papers available on the LegCo website (<http://www.legco.gov.hk>) is in the **Appendix**.

**Relevant documents on Bills Committee on
Legislative Council (Amendment) Bill 2012**

Committee	Date of meeting	Paper
Panel on Constitutional Affairs ("CA Panel")	10.2.2010 (Item III)	Agenda Minutes
Legislative Council	24.2.2010	Official Record of Proceedings Pages 46 - 49 (Written question)
CA Panel	19.3.2010 (Item III)	Agenda Minutes
	19.4.2010 (Item III)	Agenda Minutes
Legislative Council	2.6.2010	Official Record of Proceedings Pages 64 - 80 (Oral question)
CA Panel	18.10.2010 (Item II)	Agenda Minutes
	30.10.2010 (Item I)	Agenda Minutes
	24.5.2011 (Item I)	Agenda
Bills Committee on Electoral Legislation (Miscellaneous Amendments) Bill 2011	25.5.2011 (Item I)	Agenda Minutes
CA Panel	18.6.2011 (Item I)	Agenda
House Committee		Written report of the Bills Committee on Legislative Council (Amendment) Bill 2011

Committee	Date of meeting	Paper
CA Panel	31.1.2012 (Item I)	Agenda
House Committee	10.2.2012	Further report of the Bills Committee on Legislative Council (Amendment) Bill 2011

Council Business Division 2
Legislative Council Secretariat
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