

Bills Committee on Voting by Imprisoned Persons Bill

The Administration's responses to issues raised by Members at the meeting on 1 June 2009 and the submission from the Hong Kong Bar Association

Introduction

This paper sets out the Administration's responses to the issues raised at the Bills Committee meeting held on 1 June 2009 and to the submission from the Hong Kong Bar Association to the Bills Committee dated 1 June 2009.

Prison address

2. At the meeting, Members asked whether the scope of "residence" in section 28(1)(b) of the Legislative Council Ordinance (Cap.542) ("LCO") includes "prisons" in the case of a person serving a sentence of imprisonment.

3. Section 28(3) of the LCO provides that a reference to a person's only or principal residence in Hong Kong is a reference to a dwelling place in Hong Kong at which the person resides and which constitutes the person's sole or main home. It is the Administration's understanding of the LCO that a place where a person is involuntarily kept cannot be qualified as the residence of the person. In Choi Chuen Sun v. the Secretary for Justice and another (HCAL 83/2008), the applicant challenged that the Electoral Affairs Commission ("EAC") wrongfully refused his application to change his address to his prison cell in Stanley for the purposes of the register of electors. The court rejected the challenge and stated in the judgment on 8 December 2008 that :

"the EAC was quite entitled to come to the conclusion that Mr Choi's prison cell in Stanley was not his dwelling place in Hong Kong at which he resided and which constituted his sole or main home at the time of application for change of address." (paragraph 194)

The Administration has set out our position in the reply of 7 May 2009 to the Assistant Legal Adviser of the Council.

Overseas practices on the registered address of prisoners

4. At the meeting, Members asked the Administration to provide information on the overseas practices on the registered address used for the purpose of voter registration for prisoners.

5. The overseas practices on the registered address of prisoners are set out at the Annex¹. According to our findings, while prisoners in Germany and Belgium without a home address can be registered to the prison address, in other countries such as Australia, Canada, France and South Africa, the last dwelling place before the imprisonment of a prisoner is generally used as his or her registered address.

6. It is also noteworthy that in the public consultation exercise on prisoners' voting right conducted during February and March 2009, amongst the 41 submissions received which commented on the registration arrangements for prisoners without a sole or main home outside the prison, 27 of them supported that the last dwelling place of those prisoners in Hong Kong should be deemed to be their only or principal residence in Hong Kong for the purpose of voter registration².

Registered address for prisoners already registered as electors before serving their sentence of imprisonment

7. Members also enquired at the meeting about the arrangement for the registered address for prisoners who have already been registered as electors before they serve their sentence of imprisonment.

8. Let us recap below the arrangement for prisoners who have not yet been registered as electors if they apply for registration (as set out in the paper to the Panel on Constitutional Affairs (LC Paper No. CB(2)1533/08-09(01)) –

¹ The overseas practices have been set out in Annex A to the Consultation Document on Prisoners' Voting Right issued by the Administration in February 2009.

² Of the 27 submissions received, one of them also supported the option of using the address of the next-of-kin of the prisoners.

- (a) for prisoners who maintain a home in Hong Kong outside the prison, they can apply to be registered to their home address, as in the case of non-prisoners;
- (b) for prisoners who do not maintain a home in Hong Kong, they can apply to be registered to their last dwelling place in Hong Kong, but they will be required to provide proof on such an address; and
- (c) for prisoners who do not maintain a home in Hong Kong and who cannot provide any proof on their last dwelling place in Hong Kong, they can apply to be registered to the residential address last recorded by the Immigration Department under the Registration of Persons Regulations as a last resort.

9. For prisoners who have already been registered as electors before they serve their sentence of imprisonment, the arrangement for their registered address during the term of their imprisonment is similar to paragraph 8 above, in the sense that –

- (a) if they continue to maintain a home in Hong Kong outside the prison, they can continue to be registered to their home address (i.e. similar to paragraph 8(a) above); and
- (b) if they no longer maintain a home in Hong Kong during the term of imprisonment, they can continue to be registered to the address recorded in the final register, which is normally their last dwelling place in Hong Kong (i.e. similar to paragraph 8(b) above).

Arrangement for persons serving long sentence of imprisonment or life imprisonment

10. Some Members asked the Administration to consider the possibility of allowing persons serving life imprisonment (“lifers”) to use prison address as the registered address for voter registration purposes.

11. In formulating the proposed practical arrangements to facilitate prisoners to cast their votes, the Administration had given serious thought to the option of allowing prisoners in general to use the prison address as their registered address. However, as set out in the Consultation Document issued

by the Administration in February 2009, this may lead to an unduly high proportion of prisoners in the registered electorate of certain constituencies.

12. Moreover, having regard to the following considerations, we believe that it would be more appropriate to apply the same arrangement set out in paragraphs 8 and 9 above to all prisoner-electors including lifers, instead of allowing lifers to use prison address as their registered address :

- (a) As at 1 June 2009, there are 274 prisoners serving sentences of life imprisonment (“lifers”) in Hong Kong. The Long-term Prison Sentences Review Board established under the Long-Term Prison Sentences Review Ordinance (Cap. 524) will review each indeterminate sentence on a regular basis and make recommendations to the Chief Executive (“CE”) on whether it can be commuted to a fixed term. The sentences of lifers may be commuted to determinate sentences by the CE upon the exercise of his power under Article 48(12) of the Basic Law. Such prisoners are essentially the same as prisoners with a fixed term of imprisonment and thus should be treated the same manner as set out in paragraphs 8 and 9 above.
- (b) For security reasons, lifers may be transferred to different penal institutions from time to time with no fixed timetable subject to the operational need of the Correctional Services Department (“CSD”). If lifers are allowed to be registered to the prison address, the constituency to which a prisoner belongs would in a way be seen by some as it may be subject to the CSD’s arrangement.
- (c) Furthermore, we do not think that lifers have a closer connection with the community in which the penal institutions are located (compared to that of their last dwelling place), since lifers may be transferred between different penal institutions from time to time and they are held in confinement and separated from the community.
- (d) Regarding the distribution of lifers in the penal institutions, around 90% of them are currently detained in Stanley Prison and Shek Pik Prison. The concentration of lifers in these two prisons may lead

to an unduly high proportion of prisoners in the registered electorate of the constituencies concerned.

We, therefore, do not see a case to pursue this option, and have proposed the arrangement set out in paragraphs 8 and 9 above for all imprisoned persons.

Arrangement for persons required to stay in half-way houses

13. The CSD operates three half-way houses for two types of persons-
- (a) Prisoners –
 - (i) who have been sentenced to rehabilitation centres and are undergoing the second phase of the relevant rehabilitation programme conducted in the half-way houses; and
 - (ii) who are under statutory supervision which requires them to reside in half-way houses.
 - (b) Supervisees who have been released from the training centres, detention centres, drug addiction treatment centres and are subject to supervision order which requires them to reside in half-way houses.

The half-way houses are also penal institutions. Prisoners who reside in half-way houses are subject to the same registration arrangement for other prisoners as set out in paragraphs 8 & 9 above. As for supervisees, they were also once prisoners being detained in the penal institutions specified above. The Administration will make continuous efforts to remind all prisoners that they can be registered as electors based on the arrangements set out in paragraph 8(a)-(c).

Responses to the submission from the Hong Kong Bar Association

14. We welcome the general support of the Hong Kong Bar Association (“HKBA”) vide its submission dated 1 June 2009 to the Bills Committee on our proposal to remove the existing disqualification of prisoners and persons convicted of election-related or bribery offences from being registered as electors and from voting under the existing electoral legislation.

Clarification of 24(3)(b), 28(1A)(b) and 28(2A)(b) of the Bill

15. In its submission, the HKBA has expressed the view that “whether or not a prisoner has a home in Hong Kong outside the prison, he or she cannot be regarded as residing at the address of that ‘home’ while he or she is imprisoned”. It asks the Administration to clarify the need to have the new sections 24(3)(b), 28(1A)(b) and 28(2A)(b) as proposed in the Bill.

16. As set out in the Administration’s reply of 7 May 2009 to the Assistant Legal Adviser of the Council, it is the Administration’s understanding of the LegCo Ordinance that, depending on the facts of a particular case, a place can remain as a person’s residence notwithstanding his temporary absence therefrom. The fact that a person is involuntarily kept away from that place during the imprisonment period does not per se affect such place as the person’s sole or main home. Accordingly, for prisoners with a home in Hong Kong outside the prison, they should be allowed to apply to be registered to their home address, as in the case of non-prisoners (see paragraph 8(a) above).

17. It is for this reason necessary for the Bill to introduce the proposed sections 24(3)(b), 28(1A)(b) and 28(2A)(b) to the LCO, so as to differentiate between the arrangement for imprisoned persons with a home in Hong Kong outside the prison (see paragraphs 8(a) and 9(a) above) and that for imprisoned persons without such a home (see paragraphs 8(b), 8(c) and 9(b) above).

Separate consideration for lifers and prisoners serving a long sentence

18. The HKBA has also suggested that “separate consideration” be given to the case of persons imprisoned for life or over, for example, 10 years, in respect of their registered address. It is unclear as to what the HKBA considers should be the proper address to be used as the registered address for this particular group of prisoners. In any event, the drawing line of “10 years” is arbitrary and may give rise to further query and judicial challenge. It would be consistent and appropriate for the arrangement set out in paragraphs 8 and 9 above to be applied to all imprisoned persons.

19. Regarding the notion of the prisoners’ “meaningful connection” with the registered address specified in the HKBA’s submission, as explained in paragraph 12(c) above, given that lifers are transferred from time to time and

that they are held in confinement, it is difficult for them to have connection, let alone “meaningful connection”, with the community in which the prison is situated. These prisoners may indeed be more familiar with the community where they lived before, as in the case of the last dwelling place, or the address as recorded under the Registration of Persons Regulation in case no proof could be provided of the last dwelling place. The latter arrangement aims to strike a balance between ensuring that prisoners could be registered as electors even if he no longer maintains a home and minimising the risk of vote planting.

Constitutional and Mainland Affairs Bureau
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Overseas Practices on the Registered Address of Prisoners

| Countries | Registered Address of Prisoners |
|------------------|---|
| Australia | <p>Prisoners who have been registered at a certain address before they serve their sentence of imprisonment remain registered at that address. However, they have to inform the Australian Electoral Commission (AEC) in writing that they are absent from their registered address while in prison to ensure that they are not removed from the register.</p> <p>Prisoners who were eligible to be registered but have not been registered when they started their sentence of imprisonment would be registered at the address where they were last eligible to be registered (usually the last place they lived). For prisoners who were not eligible to be registered before their sentence of imprisonment, they would be registered at the first of the following places:</p> <ol style="list-style-type: none">1. where his or her next-of-kin is currently registered; or2. where he or she was born; or3. where he or she has the closest connection. |
| Belgium | <p>For prisoners who are part of a household when they started their sentence of imprisonment, they would remain registered at that household.</p> <p>For prisoners who are not part of a household when they started their sentence of imprisonment, they would be registered under the address of the prison providing that the director of the institution have indicated his agreement. Change of residence occurs for each change of institution. For each change of institution, it is necessary to ask for the agreement of the director of the new institution.</p> <p>If, during imprisonment, it appears that the prisoner is part of a new household, he will be registered under the address of that household upon his request and provided that the agreement of the reference person of the household has been given.</p> |

| Countries | Registered Address of Prisoners |
|------------------|---|
| Canada | <p>For electoral purposes, the registered address of the prisoners is the first of the following places:</p> <ol style="list-style-type: none"> 1. his or her residence before his or her sentence of imprisonment; or 2. the residence of the spouse, the common-law partner, a relative or dependant of the elector, a relative of his or her spouse or common-law partner or a person with whom the elector would live if not being sentenced; or 3. the place of his or her arrest; or 4. the last court where the elector was convicted and sentenced. |
| France | Prisoners are registered according to their last area (commune) of residence. |
| Germany | <p>Prisoners with a permanent residence in a German municipality are usually registered in the electoral list there.</p> <p>Prisoners without a permanent residence in a German municipality are registered in the electoral area of the prison.</p> |
| South Africa | For electoral purposes, the registered address of the prisoners is the last home or place where he or she normally lived when not imprisoned or detained. |