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Report of the Bills Committee on Voting by Imprisoned Persons Bill

Purpose

This paper reports on the deliberations of the Bills Committee on Voting by Imprisoned Persons Bill.

Background

Current statutory provisions relevant to the voting right of prisoners

2. Article 21 of the Hong Kong Bill of Rights (Cap. 383) which was enacted in 1991 provides that -

"Every permanent resident shall have the right and the opportunity, without any of the distinctions mentioned in article 1(1) and without unreasonable restrictions -

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) to have access, on general terms of equality, to public service in Hong Kong."

Article 1(1) referred to in Article 21 provides that -

"The rights recognized in this Bill of Rights shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

3. Article 26 of the Basic Law provides that permanent residents of the Hong Kong Special Administrative Region (HKSAR) shall have the right to vote and the right to stand for election in accordance with law.

4. Under the current electoral legislation, the following three types of persons are, among others, disqualified from being registered as electors and from voting at elections of the Chief Executive (CE), Members of the Legislative Council (LegCo), members of District Councils (DCs), members of the Election Committee (EC) and village representatives (VRs) -

- (a) persons who have been sentenced to death or imprisonment in Hong Kong or any other place and have not served the sentence or undergone any substituted punishment or received a free pardon;
- (b) persons who are serving a sentence of imprisonment; and
- (c) persons who are or have been convicted of certain election-related or bribery offences and election is to be held within three years after the conviction (collectively as "the three types of persons").

High Court judgment in 2008

5. On 8 December 2008, the Hon Mr Justice Andrew CHEUNG handed down a High Court judgment on three applications for judicial review (HCAL 79/2008, HCAL 82/2008 and HCAL 83/2008) which challenged the constitutionality of existing provisions in the Legislative Council Ordinance (Cap. 542) (LCO) disqualifying prisoners from being registered as electors and voting in election of Members of LegCo.

6. The Court considers that the blanket and automatic disqualification of prisoners draws no distinction as to the type, nature or seriousness of different offences, the length of custodial sentences and the stage of the imprisonment. It is held that section 31(1)(a) and (b) and section 53(5)(a) and (b) of LCO relating to registration as an elector and voting respectively contravene the right to vote constitutionally guaranteed under Article 26 of the Basic Law and Article 21 of the Hong Kong Bill of Rights. It would be a matter for the Legislature and the Executive to determine how the voting right of prisoners could be restricted in a reasonable fashion. The Court also directs that arrangements should be made to enable prisoners to vote on the election day.

7. Upon the Administration's application, the Court granted a temporary 10-month suspension order in relation to its declarations relating to prisoners' voting right up to 31 October 2009.

8. The Administration launched a public consultation exercise on prisoners' voting right from 9 February to 23 March 2009. Taking into account the views received in the exercise, the Administration suggested the following proposals for relaxing the existing restrictions on prisoners' voting right:

- (a) to remove the existing disqualification of prisoners from being registered as electors under section 31(1)(a)-(b) of LCO;
- (b) to remove the existing disqualification of prisoners from voting under section 53(5)(a)-(b) of LCO; and
- (c) to remove the existing disqualification of persons convicted of election-related or bribery offences from being registered as electors under section 31(1)(c) and the existing disqualification of such persons from voting under section 53(5)(c) of LCO.

The Administration also proposed to remove similar disqualification provisions in other electoral ordinances.

Objects of the Bill

9. The objects of the Bill are to amend the Chief Executive Election Ordinance (Cap. 569), LCO, District Councils Ordinance (Cap. 547) and Village Representative Election Ordinance (Cap. 576) (collectively as "the Ordinances") to remove restrictions on -

- (a) registration of the three types of persons as electors; and
- (b) voting by those persons at elections of CE, Members of LegCo, members of DCs, members of EC and VRs.

The Bills Committee

10. At the House Committee meeting held on 8 May 2009, members decided that a Bills Committee be formed to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

11. Under the chairmanship of Hon IP Kwok-him, the Bills Committee has held five meetings with the Administration. The Bills Committee has received views from deputations at one of these meetings. A list of the organizations which have submitted views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

Commencement of the Ordinance if enacted

12. The Bill contains no commencement clause. If enacted, the Ordinance will come into operation on the day on which it is published in the Gazette.

13. The Administration has advised the Bills Committee that it sees merits for the Bill and the amendments to the relevant electoral regulations to commence operation on the same date so that there will be a consistent and integral legal framework to facilitate prisoners and persons held in custody to exercise their voting right. In this connection, the Administration has proposed to add a commencement clause to the Bill to the effect that the enacted Ordinance shall come into operation on a day to be appointed by the Secretary for Constitutional and Mainland Affairs by notice published in the Gazette.

14. The Administration has reiterated that it hopes that the provisions in the Bill and the subsidiary legislation would commence at the same time in order to put in place the relevant electoral arrangements. The Administration would table a set of subsidiary legislation on practical voting arrangements at the Council meeting on 24 June 2009, and another set of subsidiary legislation on registration arrangements at the Council meeting on 8 July 2009 after enactment of the Bill.

15. The Bills Committee raises no objection to the Administration moving this Committee Stage amendment (CSA).

Disqualification provisions of the three types of person from being registered as elector and from voting in the relevant elections

16. The Bill seeks to repeal the existing provisions in the Ordinances which disqualify the three types of persons from being registered as electors and from voting at elections of CE, Members of LegCo, members of DCs, members of EC and VRs. Members in general are supportive of the proposed relaxation.

Registration of eligible prisoners as electors in geographical constituencies

17. To enable registration of eligible prisoners who do not have a home in Hong Kong outside the prison in geographical constituencies, the Bill seeks to amend -

- (a) section 24 of LCO to provide that section 24(2)(b) does not apply to a prisoner who does not have a home in Hong Kong outside the prison. Section 24(2)(b) prohibits a registered elector from continuing to be registered as an elector in a geographical constituency if the Electoral Registration Officer is satisfied that the person no longer resides at the residential address recorded and that Officer does not know the person's new principal residential address.
- (b) section 28 of LCO to -
 - (i) allow a prisoner, not having been registered as elector before, to use the last dwelling-place, or if no proof on the last dwelling place is available, the residential address last recorded under the Registration of Persons Regulations (Cap. 177 sub. leg. A) for registration purposes if he does not have a home in Hong Kong outside the prison; and

- (ii) ensure that the names of prisoners who are registered electors will not be omitted by reason of their no longer having a home outside the prison.

18. The Administration has further explained to the Bills Committee the following arrangement for prisoners who have not yet been registered as electors, if they apply for registration under LCO -

- (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.

19. The Administration has further confirmed that for prisoners who have already been registered as electors before serving their sentence of imprisonment, the arrangement for their registered address during the term of their imprisonment is similar to that as elaborated in paragraph 18 (a) and (b) above.

20. The legal adviser to the Bills Committee has queried whether the plain and ordinary meaning of "dwelling-place at which the person resides and which constitutes the person's sole or main home" can be extended to cover a dwelling-place where one does not actually reside due to the fact that he is serving a sentence of imprisonment (especially in the case of a long-term imprisonment) although he still maintains it as his sole or main home outside the prison.

21. The Administration has advised that it is the Administration's understanding of LCO 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. As such, for a prisoner with a home in Hong Kong outside the prison and eligible for registration, the reference of "at which the person resides" in section 28(3) of LCO does not preclude him from being registered to his home address outside the prison (nor would the reference of "no longer resides at the residential address recorded" in section 24(2) of LCO oblige the removal of his name from the register).

Prisoners' choice of residential address for the purpose of voter registration

22. It is the policy intention of the Administration to preclude a prisoner from using a prison address as his residential address for the purpose of voter registration. The Administration's concern is that it may lead to an unduly high proportion of prisoners in the registered electorate of certain constituencies. The Administration stresses that the arrangement in paragraph 18(c) above allows, as a last resort, prisoners who do not maintain a home in Hong Kong and could not provide any proof on their last dwelling place to register at the residential address (at which the persons have resided before) as recorded under the Registration of Persons Regulation, while avoiding the risk of vote planting in order to ensure the integrity of an election.

23. Members note from the findings provided by the Administration that while 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, prisoners in Germany and Belgium without a home address can be registered to the prison address. Some members including Dr Margaret NG, Mr James TO, Mr LEUNG Yiu-chung, Ms Audrey EU and Mr Paul TSE have expressed the view that prisoners, particularly those serving long-term or life imprisonment, may well not have a home in Hong Kong other than the prison where they are incarcerated and may want to use a prison address as their residential addresses for the purpose of voter registration. They consider that the residential addresses of these prisoners last recorded by the Immigration Department under the Registration of Persons Regulations, which may no longer exist, is arbitrary and would not have a meaningful connection with them. These members have expressed the view that special consideration should be given to these prisoners who should not be precluded from using a prison address as their residential addresses for the purpose of voter registration. Some members have suggested that the Bill should provide a prisoner the choice to use a prison address as his or her residential address.

24. The Administration takes the view that a place where a person is involuntarily kept does not qualify as one's residence under LCO. The Administration has quoted the High Court judgment on 8 December 2008 on Choi Chuen Sun v Secretary for Justice and Electoral Affairs Commission (HCAL 83/2008)) in which the Court rejected the application by a prisoner (who has been sentenced to an imprisonment of 54 months) to change his address to his prison cell in Stanley for the purposes of the register of electors. The judgment has re-affirmed that -

"the EAC [i.e. the Electoral Affairs Commission] 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 of the Judgment)

25. Members note from representatives of the Hong Kong Bar Association and the Civic Party presenting views to the Bills Committee that there are diverse legal views as to whether a prison address could be used as a residential address for the purpose of

voter registration. The legal adviser to the Bills Committee has given the following advice on the issue of whether a prison address could qualify as residential address of the persons imprisoned thereat for the purpose of voter registration under the existing electoral law -

- (a) the residence requirement contained in the existing section 28 of LCO is drafted against the background that prisoners are not entitled to be registered as electors and to vote. With the removal of restrictions on voting right of prisoners, a prisoner serving a long-term imprisonment who no longer has a home outside the prison may still become ineligible for voter registration unless the prison address of such a person may be regarded as registrable as a residential address under the existing section 28 or some other alternative arrangements that have to be made if the prison address is not so registrable; and
- (b) in view of the fact that registration is a prerequisite to one's exercise of his or her voting rights, the Court may adopt a purposive approach in interpreting the existing residence requirement if it is satisfied that the person concerned may otherwise become ineligible because of his not having a registrable address. Due consideration should be given to the facts of individual cases. The fact that a prison is not capable of being voluntarily adopted as one's residence may be regarded as immaterial for determining one's residential address for electoral registration purposes. As such, a prison may well qualify as one's residence or home for the registration purposes in the case of a prisoner who is able to prove that he has no other registrable address.

26. On the suggestion of allowing prisoners serving long-term imprisonment to use prison address as their registered addresses for the purpose of voter registration, the Administration is of the view that it would be arbitrary to draw the line as to the length of time which would be considered as a long-term imprisonment, and it may give rise to further query and judicial challenge. The Administration considers that it would be consistent and appropriate for the arrangement set out in paragraph 18 above to be applied to all prisoners.

27. On the suggestion of allowing prisoners serving life imprisonment (lifers) to use prison address as their registered addresses for the purpose of voter registration, the Administration has advised that having regard to the following considerations, it is considered more appropriate to apply the same arrangement to all prisoners-electors including lifers -

- (a) as at 1 June 2009, there are 274 lifers in Hong Kong. The Long-term Prison Sentences Review Board established under the Long-Term Prison Sentences Review Ordinance (Cap. 524) would review each indeterminate sentence on a regular basis and make recommendations to CE on whether it can be commuted to a fixed term. The sentences of lifers may be commuted to determinate sentences by CE upon the

exercise of his power under Article 48(12) of the Basic Law. Such lifers are essentially the same as prisoners with a fixed term of imprisonment;

- (b) lifers may be transferred to different penal institutions from time to time for security reasons, with no fixed timetable subject to the operational need of the Correctional Services Department (CSD). If these lifers are allowed to be registered to the prison address, the constituency to which a prisoner belongs may in a way be seen by some as being subject to the CSD's arrangement;
- (c) lifers do not have a closer connection with the community in which the penal institutions are located (compared to that of their last dwelling place), since they may be transferred between different penal institutions from time to time and they are held in confinement and separated from the community; and
- (d) as around 90% of lifers are currently detained in Stanley Prison and Shek Pik Prison, the concentration of these lifers in these two prisons may lead to an unduly high proportion of these lifers in the registered electorate of the constituencies concerned.

28. Ms Emily LAU has queried the basis for the Administration's concern that the concentration of lifers in Stanley Prison and Shek Pik Prison may lead to an unduly high proportion of these lifers in the registered electorate of the constituencies concerned. The Administration has explained that 90% of these 274 lifers are detained in Stanley Prison and Shek Pik Prison and each of the two constituencies concerned is a small constituency with around 6 000 to 7 000 registered voters.

29. The Administration has further explained that under section 28(1)(b) of LCO, a person applying for registration must satisfy the Electoral Registration Officer, among other things, that the residential address notified in his application is the person's only or principal residence in Hong Kong. There is no question of an elector being given a choice among various addresses (even if he has more than one home) as his "registered address". The requirement for each elector to be eligible to be registered to one address only is aimed at minimizing uncertainty, which is important to addressing concerns on vote-planting. This principle applies to voter registration for members of the general public and prisoners, and should equally apply to lifers. The Administration has also cautioned that if lifers are subject to a set of arrangement different from the other prisoners, some prisoners serving long-term imprisonment may also request similar treatment. Any line to be drawn by extending such different arrangement may give rise to further queries and judicial challenges.

30. Some other members including Mr WONG Yung-kan, Mr CHEUNG Hok-ming, Dr Priscilla LEUNG and Dr PAN Pey-chyou share the Administration's concern that if a prison address is accepted as a registered address for the purpose of voter registration, it may lead to an unduly high proportion of prisoners in the registered electorate of certain constituencies, resulting in unfairness in an election

and possibly unbalanced impact on the community affairs in the constituencies concerned. They are concerned that as a prisoner is subject to transfer for security reasons, it would be difficult and arbitrary in determining which prison address should be used as his residential address. These members also consider that as the environment of a prison is different from that of a home, it is questionable that prisoners would have a meaningful connection with the community. While prisoners' voting right should be respected, the interest and opinion of ordinary citizens in the constituencies concerned should also be considered.

31. Some members including Dr Margaret NG and Mr James TO maintain the view that lifers should not be precluded from using their prison addresses as the residential addresses for the purpose of voter registration. These members reiterate that lifers would have a more meaningful connection with the prison address than the residential address last recorded by the Immigration Department under the Registration of Persons Regulations.

32. Mr James TO further considers that as lifers are mainly detained in Stanley Prison and Shek Pik Prison, community affairs there such as availability of convenient transportation for visitors to prison and air quality could be of concern to prisoners and depriving them of the right to vote in a constituency they are closely connected with, particularly in a DC election, could be challenged as unconstitutional. Referring to the Administration's explanation in paragraph 29 above, while Mr TO agrees that there is no question of choice being given as to the use of residential address for voter registration, he maintains that lifers should not be precluded from being registered to a prison address, provided that no address is established to the satisfaction of the Electoral Registration Officer to be the last dwelling place in Hong Kong at which the person resided and which constituted the person's sole or main home.

33. Dr Margaret NG stresses that while under the common law and existing domestic law a prison generally could not be regarded as a residential place, for the enactment of a new piece of legislation to restore the voting right of prisoners, consideration should be given to whether the use of prison address should be allowed for the purpose of voter registration because the uppermost principle should be to give maximum choice to an elector, subject to any insurmountable practical difficulties. She considers that to give effect to Article 25 of the International Covenant on Civil and Political Rights (incorporated as Article 21 of the Hong Kong Bill of Rights), any restriction on the voting right must be reasonable, necessary and proportionate. The choice of an elector should not be restricted on grounds of expediency and the Administration must provide sufficient grounds and good reasons before imposing any restrictions. She considers that a lifer should be given the option provided that the prison could meet the legal requirement of being his or her sole or principal residence on the basis of facts. Dr NG would move CSAs to the effect that if no address is established to the satisfaction of the Electoral Registration Officer to be the last dwelling place in Hong Kong at which a lifer resided and which constituted his or her sole or main home, the residential address of the person last recorded by the Immigration Department under the Registration of Persons Regulations or the address

of the prison in which the lifer is serving his sentence could be used as the residential address for the purpose of voter registration.

34. The Administration maintains that the arrangement in paragraph 18 above would ensure that all eligible prisoners would have a "registered address" to enable them to exercise their right to vote, while avoiding the risk of vote planting in order to ensure the integrity of an election. Hence the arrangement is consistent with the relevant provisions of the Basic Law.

35. The Administration has, however, undertaken that it would consider studying overseas experiences on the use of a prison address as the residential address for the purpose of voter registration and review the pros and cons of the arrangements in paragraph 18 after the next LegCo and DC elections.

Practical arrangements for voting by prisoners

36. At the Bills Committee's request, the Administration has provided information about the administrative and security arrangements for prisoners and remanded unconvicted persons to be registered as an elector and to vote on the polling day. The Bills Committee notes that the practical electoral arrangements are provided for in the subsidiary legislation made by the Electoral Affairs Commission (EAC) under the Electoral Affairs Commission Ordinance (EACO) (Cap. 541). Necessary amendments are being prepared by EAC in respect of the relevant electoral regulations to implement the proposed arrangements.

37. In response to members' concern about whether prisoners and unconvicted remanded persons would have adequate access to election-related materials, the Administration has explained that as provided under the electoral regulations and under the established practice, the Registration and Electoral Office (REO) sends poll cards together with the candidates' introductory leaflet to electors before the polling day. To ensure that electors who are serving prison sentences receive the poll cards and introductory leaflet as early as possible, REO would send such materials to their addresses in the penal institutions of CSD as far as practicable. As for persons held in custody who are registered electors, the poll cards and candidates' introductory leaflet would be sent to their registered address or correspondence address (if any). Additional copies of the candidates' introductory leaflets would also be made available at CSD and other law enforcement agencies (LEAs) for such persons' reference.

38. Representatives of the Society for Community Organization and the Civic Party presenting views to the Bills Committee have also stressed the importance of ensuring effective communication between candidates and prisoners-electors and their adequate access to election-related materials published by candidates. They stress that in order to afford adequate protection of the voting right of prisoners, the arrangement should be clearly set out by way of subsidiary legislation. It is further suggested that prisoners should be allowed to use internet for access to election-related materials during the electoral period as it should not give rise to any security concerns.

39. The Administration has informed the Bills Committee that candidates would be provided with gum labels containing the registered address or the correspondence address (if any) of the registered electors following the existing practice for mailing election advertisements. For privacy reasons, prisoners might choose to use their prison addresses or other addresses as their correspondence addresses when they registered as electors. Prisoners and persons held in custody who are registered electors could access election-related information through the mass media such as newspapers and radio in accordance with the existing policies of LEA on access to mass media. CSD has also been considering the feasibility of allowing the use of internet in penal institutions.

40. Members note that due to security considerations, arrangements would not be made to facilitate in-person canvassing activities inside a penal institution of CSD or a premise of a LEA where persons are imprisoned or held in custody. For fairness purpose, no canvassing activities would be allowed by visitors during visits made in their official capacities to prisoners and persons held in custody.

41. Mr WONG Yung-kan opines that no visit during the electoral period should be allowed for any person who has participated in the relevant election, in order to avoid any unfairness. Mr IP Kwok-him and Dr Priscilla LEUNG, however, consider that visits made in official capacities should not be disallowed, provided that they are conducted in accordance with the electoral law and in compliance with the principle of fairness. The Administration has explained that there may be a practical need for a person in his official capacity such as justices of peace, lawyers and social workers to visit prisoners and persons held in custody. CSD would inform the Police of any breach of the electoral laws for the purpose of taking law enforcement action accordingly. The Administration assures the Bills Committee that the issue would be further considered in the context of drafting the relevant subsidiary legislation.

42. Members note that due to security reasons, only candidates may enter dedicated polling stations set up inside maximum security prisons to observe the poll. Dr Margaret NG has expressed concern that given the fact that an election agent should legally be able to do all the things on the candidate's behalf, the arrangement would depart from the existing legal principle and would have the effect of limiting the rights of a candidate. The Administration has explained that it is necessary for security reasons to limit the number of visitors in a maximum security prison. However, the Administration would consider members' view when drafting the relevant subsidiary legislation.

43. In response to members' concerns about the practical arrangement for voting by prisoners, the Administration assures the Bills Committee that to ensure that all parties involved in the election would be well aware of the electoral arrangements, EAC would make necessary amendments to the relevant election guidelines. Adequate briefing would also be provided to the staff of CSD and LEAs involved. In addition, reviews would be conducted after every election so as to improve the practical arrangements for prisoners and other persons in custody to exercise their voting right.

Electoral arrangement for persons required to stay in half-way houses

44. Members have requested that the Administration should also sort out the arrangement for persons required to stay in half-way houses. The Administration has explained that 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.

According to the Administration, 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.

Date of resumption of Second Reading debate

45. The Bills Committee supports the resumption of the Second Reading debate on the Bill on 24 June 2009.

Consultation with the House Committee

46. The Bills Committee reported its deliberations to the House Committee on 12 June 2009 and submitted a written report to the House Committee on 19 June 2009.

Bills Committee on Voting by Imprisoned Persons Bill

Membership list

Chairman	Hon IP Kwok-him, GBS, JP
Members	Dr Hon Margaret NG Hon James TO Kun-sun Hon LEUNG Yiu-chung Hon WONG Yung-kan, SBS, JP Hon Emily LAU Wai-hing, JP Hon Audrey EU Yuet-mee, SC, JP Hon LEUNG Kwok-hung Hon CHEUNG Hok-ming, SBS, JP Hon WONG Ting-kwong, BBS Hon CHIM Pui-chung Dr Hon Priscilla LEUNG Mei-fun Dr Hon PAN Pey-chyou Hon Paul TSE Wai-chun Dr Hon Samson TAM Wai-ho, JP
	Total : 15 Members
Clerk	Miss Flora TAI
Legal Adviser	Ms Clara TAM
Date	21 May 2009

《在囚人士投票條例草案》委員會
Bills Committee on Voting by Imprisoned Persons Bill

曾向法案委員會表達意見的團體名單
List of organizations which have
given views to the Bills Committee

團體名稱

Name of organizations

- | | |
|-------------|------------------------------------|
| 1. 共建美好坪洲聯會 | Betterment for PENG CHAU |
| 2. 公民黨 | Civic Party |
| 3. 香港大律師公會 | Hong Kong Bar Association |
| 4. 香港人權監察 | Hong Kong Human Rights Monitor |
| 5. 香港社區組織協會 | Society for Community Organization |