

# 立法會

## *Legislative Council*

LC Paper No. LS66/08-09

### **Paper for the House Committee Meeting on 8 May 2009**

#### **Legal Service Division Report on Voting by Imprisoned Persons Bill**

#### **I. SUMMARY**

- 1. Objects of the Bill** To amend the Chief Executive Election Ordinance (Cap. 569), Legislative Council Ordinance (Cap. 542), District Councils Ordinance (Cap. 547) and Village Representative Election Ordinance (Cap. 576) to remove restrictions on the registration of imprisoned persons as electors and their right to vote at the relevant elections.
- 2. Comments** In light of the judgment handed down by the Court of First Instance on 8 December 2008, the Bill seeks to -
  - (a) repeal existing provisions disqualifying the imprisoned persons from being registered as electors and from voting; and
  - (b) make amendments to enable the eligible imprisoned persons who do not have a home in Hong Kong outside the prison to be registered as an elector in geographical constituencies.
- 3. Public Consultation** Public consultation was conducted in February 2009 and, according to the Administration, the public largely supports the removal of the existing restrictions on the imprisoned persons in voting and registration as electors.
- 4. Consultation with LegCo Panel** The Panel on Constitutional Affairs was briefed by the Administration on the results of public consultation and the legislative proposals on 20 April 2009. A majority of members expressed support for the proposals.
- 5. Conclusion** Clarification is being sought from the Administration on the drafting aspect of the Bill. Members may wish to form a Bills Committee to study the Bill in detail.

## **II. REPORT**

### **Objects of the Bill**

To amend the Chief Executive Election Ordinance (Cap. 569), Legislative Council Ordinance (Cap. 542) (LCO), District Councils Ordinance (Cap. 547) and Village Representative Election Ordinance (Cap. 576) (collectively as "Ordinances") to remove restrictions on -

- (a) registration of persons who have been sentenced to death or imprisonment, persons who are serving a sentence of imprisonment and persons who have been convicted of certain election-related or bribery offences as electors; and
- (b) voting by those persons at elections of the Chief Executive, members of the Legislative Council, members of District Councils, members of the Election Committee and village representatives.

### **LegCo Brief Reference**

2. CMAB C1/30/25 issued by the Constitutional and Mainland Affairs Bureau dated 28 April 2009.

### **Date of First Reading**

3. 6 May 2009.

### **Comments**

#### Existing Restrictions

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, members of the Legislative Council, members of District Councils, members of the Election Committee and village representatives -

- (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 on the date of the election; 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 "imprisoned persons").

## 2008 Judgment

5. On 8 December 2008, the Court of First Instance handed down its judgment on three judicial reviews (HCAL 79/2008, HCAL 82/2008 and HCAL 83/2008), which challenged the constitutionality of existing provisions in the LCO disqualifying prisoners from being registered as electors and voting in election of members of the Legislative Council.

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 the 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. The Court also directs that arrangements should be made to enable prisoners to vote on the election day.

## The Amendments

7. The Bill seeks to repeal the existing provisions in the Ordinances which disqualify the imprisoned person from being registered as elector and from voting in the relevant elections.

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

- (a) section 24 of the LCO to provide that section 24(2)(b) does not apply to an imprisoned person who does not have a home in Hong Kong outside the prison. Section 24(2)(b) prohibits one from being 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 the LCO to -
  - (i) allow an imprisoned person, not having been registered as elector before, to use the last dwelling-place, or if not available, the residential address 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 imprisoned persons who are registered electors will not be omitted by reason of their no longer having a home outside the prison.

9. According to the Administration, amendments to the relevant subsidiary legislation under Electoral Affairs Commission Ordinance (Cap. 541) will be introduced in this legislative session.

## **Public Consultation**

10. In light of the 2008 Judgment, the Administration issued the Consultation Document on Prisoners' Voting Right to consult the public on the relaxation of the restrictions on prisoners' voting right and the practical voting arrangements in February 2009. The consultation lasted for 6 weeks from 9 February to 23 March 2009.

11. In April 2009, the Administration published the Report on Public Consultation on Prisoners' Voting Right, which summarized views of the public including interested organizations and individuals, gathered from written submissions, opinion polls and forums. According to the Administration, the public largely supports -

- (a) the removal of the existing restrictions; and
- (b) the practical arrangements proposed by the Administration that the prisoners should be registered to the address of their sole or main home if they continue to maintain a sole or main home outside the prison; for prisoners who do not maintain a sole or main home, their last dwelling-place in Hong Kong at which they resided before serving their sentence of imprisonment should be deemed to be their only or principal residence in Hong Kong for the purpose of voter registration.

## **Consultation with LegCo Panel**

12. The Administration briefed the Panel on Constitutional Affairs at its meeting on 20 April 2009 on the results of the public consultation and the relevant legislative proposals. A majority of the members expressed support for the Administration's proposal to remove the existing restrictions. Members also expressed concern on practical arrangements to facilitate voting by the imprisoned persons.

## **Conclusion**

13. Clarification is being sought from the Administration on the drafting aspect of the Bill (please see the attached letter to the Administration). Members may wish to form a Bills Committee to study the Bill in detail.

Prepared by

TAM Shuk-fong, Clara  
Assistant Legal Adviser  
Legislative Council Secretariat  
6 May 2009

LS/B/10/08-09  
2869 9478  
2877 5029

**URGENT BY FAX &  
BY POST**

Fax No. : 2840 1976

6 May 2009

Secretary for Constitutional and Mainland Affairs  
(Attention: Mr Thomas Wu, AS (C&MA)2A)  
Constitutional and Mainland Affairs Bureau  
3rd Floor, Main and East Wing,  
Central Government Offices,  
11 Ice House Street,  
Central,  
Hong Kong

Dear Mr Wu,

### **Voting by Imprisoned Persons Bill**

I am scrutinizing the legal and drafting aspects of the Voting by Imprisoned Persons Bill and have the following observations on the proposed amendments to sections 24 and 28 of the Legislative Council Ordinance (Cap. 547) (LCO) -

(a) Imprisoned Persons who have a home in Hong Kong outside prison

Under section 28 of the LCO, a person who seeks to apply for registration as an elector in the register of geographical constituencies under the LCO has to satisfy the Electoral Registration Officer that the residential address notified is his only and principal residence in Hong Kong. The only and principal residence is defined to mean "a dwelling-place in Hong Kong at which the person resides and which constitutes the person's sole or main home" (Section 28(3)).

For those imprisoned persons who do not have a home in Hong Kong outside the prison, the Bill introduced amendments to provide for the determination of their residential address by adding new subsections (1A), (1B) and (2A) to section 28.

There may well be an imprisoned person who maintains a home in Hong Kong outside prison, in respect of which no new provision has been proposed. It would appear therefore that the existing provisions of section 28 would have to apply. It is doubtful 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 imprisonment term) although he still maintains it as his sole or main home outside the prison.

This query may also arise under section 24(2) of the LCO, which empowers a Electoral Registration Officer to remove a person's name from the register if that Officer is satisfied that the person no longer resides at the recorded address and that officer does not know the person's new principal residential address. The Bill proposes a new section 24(3) to exclude only the imprisoned person who does not have a home in Hong Kong outside the prison from the application of section 24(2). Hence, an imprisoned person with a home in Hong Kong outside the prison may still be within the ambit of section 24 and thus liable to have his name removed because he can no longer reside at his recorded residential address, even if the Electoral Registration Officer knows that he is imprisoned.

(b) Imprisoned Persons' choice of residential address

It would appear from the effect of new section 28(1A), (1B) and (2A) that an imprisoned person is precluded from using the prison in which he is incarcerated as the residential address for the registration purposes under the LCO even though he does not have a home outside the prison. Please confirm this is the effect intended by the Administration and clarify the relevant policy.

I would be grateful for your response to facilitate my reporting to the House Committee on 8 May 2009 (in both Chinese and English and with soft copy to Ms Christine LIU at ylliu@legco.gov.hk).

Yours sincerely,

(Clara TAM)  
Assistant Legal Adviser

cc. DoJ (Attn.: Mr Gilbert MO, DLD(BD&A) (By Fax: 2869 1302) &  
Miss Mandy NG, GC (By Fax: 2845 2215))