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Panel on Constitutional Affairs

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 19 January 2009**

Voting right of prisoners

Purpose

This paper provides background information on the voting right of prisoners and summarizes the discussions held by the Panel on Constitutional Affairs (the Panel) since the first Legislative Council (LegCo).

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 sections 31 and 53 of the Legislative Council Ordinance (Cap. 542) and section 30 of the District Councils Ordinance (Cap. 547), a person who is serving a sentence of imprisonment or a person who has been sentenced to death or imprisonment but has not served the sentence or received a free pardon is disqualified from being registered as an elector, and from voting in LegCo and District Council (DC) elections. These disqualification provisions are in the **Appendix**. Members may wish to note that a member of the Election Committee is also disqualified from voting at the poll of a Chief Executive election under section 26 of the Chief Executive Election Ordinance (Cap. 569) if he is serving a sentence of imprisonment on that polling date.

Legislative history of the relevant electoral law

5. The Electoral Provisions Ordinance (Cap. 367) which was enacted in 1981 provided for the election of members of the former Urban Council and of the former District Boards. Section 11 of this Ordinance disqualified a person from being registered as an elector or from voting at the relevant elections if he had been sentenced in Hong Kong or any other territory or country to death or imprisonment for a term exceeding six months and he has not served the sentence or received a free pardon. Similar disqualification provisions were included in the Legislative Council (Electoral Provisions) Ordinance (Cap. 381) which was enacted in 1985 to cater for the first LegCo election held in that year to return members from functional constituencies. In 1990, the Electoral Provisions Ordinance was amended to cover LegCo geographical constituency elections.

6. Members may wish to note that LegCo appointed a Select Committee on 29 January 1992 "to review the arrangements for the 1991 Legislative Council elections and to report its recommendations on the arrangements for future Legislative Council elections" (the Select Committee on LegCo Elections). The Select Committee recommended that the disqualification of registration of persons who were serving sentences of imprisonment under section 11 of the Electoral Provisions Ordinance should be repealed, although the disqualification of voting should stay¹.

7. In 1995, Mr Andrew WONG presented a private Member's Bill, i.e. the Electoral Provisions (Amendment) Bill 1995 which sought to remove certain restrictions on registration as an elector, voting or nomination as a candidate at an election and holding office as an elected Member of LegCo, the two former Municipal Councils and the former District Boards, as contained in the Electoral Provisions Ordinance and the Legislative Council (Electoral Provisions) Ordinance, including the disqualification provisions applicable to prisoners. The Bill was voted down at the Council sitting held on 28 July 1995.

¹ paragraph 5.17 of the Report of the Select Committee on LegCo Elections

8. The Electoral Provisions Ordinance and the Legislative Council (Electoral Provisions) Ordinance were not adopted as the law of HKSAR upon its establishment on 1 July 1997. The Administration presented in that year the LegCo Bill to the Provisional LegCo. The Bill provided for the constitution of LegCo and related matters including the election of LegCo Members. The disqualification provisions applicable to prisoners in the Bill were identical to those in the Electoral Provisions Ordinance and the Legislative Council (Electoral Provisions) Ordinance, but the limitation of imprisonment exceeding six months was removed.

9. When the Bill resumed its Second Reading debate at the Council meeting on 27 September 1997, Mr Andrew WONG moved an amendment at the Committee Stage of the Bill which provided that only prisoners and escaped convicts sentenced to death or imprisonment for a term exceeding six months and who had not served their sentence in full would be disqualified from voting in Hong Kong. The amendment was negated.

10. The District Council Ordinance which was enacted on 10 March 1999 provides for the establishment, composition and functions of DCs and the election of their members. The disqualification provisions applicable to DC electors are similar to those for LegCo electors.

Discussions by the Panel

11. In February 2005, Duty Roster Members (DRM) received views from the Society for Community Organization concerning, inter alia, voting right of prisoners. On the instruction of DRM, the issue was referred to the Panel for follow-up (LC Paper No. CB(2)1143/04-05 issued on 22 March 2005).

12. At its meeting held on 30 May 2005, the Panel discussed the voting right of prisoners with the Administration. The Administration's position at that time was that -

- (a) international human rights conventions and the Hong Kong Bill of Rights Ordinance permit reasonable restrictions on the right to vote; and
- (b) it was generally accepted in Hong Kong that when a person had been convicted of an offence and sentenced to imprisonment, he could be deprived of certain rights.

13. According to the Administration's paper provided for the meeting (LC Paper No. CB(2)1670/04-05(03) issued on 25 May 2005), a number of countries including the United Kingdom, Japan and most states of the United States of America have imposed total ban on prisoner voting. Other countries such as France and Germany have different restrictions on prisoners' right to vote, based on the court's determination on whether and how long the convicted person's right to vote should be

forfeited. In Australia, prisoners serving a sentence of three years or more and convicts of treason are barred from voting in federal elections.

14. Some members expressed the view that prisoners should not be deprived of the opportunity to vote as it was a basic civil right. They considered that the society was changing and different restrictions could be introduced on prisoners' right to vote on the basis of the length of the sentence. These members requested that the Administration should launch a review on the issue. There was, however, another view that a change of policy was not warranted because international human rights conventions permitted reasonable restrictions on the right to vote.

15. The Administration's response was that it did not intend to launch a review on the issue at that stage. Different places had adopted different policies on prisoners' right to vote, having regard to their own circumstances. The Administration considered that the community had not called for such a review. However, if the proposal of allowing prisoners to vote were to be explored, consideration should be given to a range of issues including security arrangement, casting of vote by post, electioneering arrangement, etc.

Latest development

16. On 8 December 2008, the Hon Mr Justice Andrew CHEUNG handed down a High Court judgment on three applications for judicial review relating to a prisoner's right to vote in LegCo elections (HCAL 79/2008, HCAL 82/2008 and HCAL 83/2008). According to the judgment, the provisions disqualifying a prisoner from registration as an elector and from voting in LegCo elections contravene the right to vote 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.

17. Members may wish to note that according to the statistics as at 5 September 2008 quoted in the judgment², there were 4 239 prisoners (who were Hong Kong permanent residents and aged 18 or above) serving fixed terms of imprisonment in Hong Kong. 626 of them were serving a term of six months or less. 2 313 were serving a term from six months to three years. 1 300 were serving a term of more than three years. There were another 211 prisoners who were Hong Kong permanent residents and aged 18 or above serving life sentences in Hong Kong.

18. The Administration is scheduled to revert to the Panel at its meeting scheduled for 19 January 2009 on its way forward.

19. Members may wish to note that the Hon Mr Justice CHEUNG also takes the view that the constitutional right to vote of remanded persons (i.e. persons who are

² paragraph 11 of the judgment

remanded in custody awaiting trial) is not affected by any law, and arrangements should be made to enable them to vote on election days whilst being held in custody³.

Council Business Division 2
Legislative Council Secretariat
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³ paragraph 203 of the judgment

31. When person is disqualified from being registered as an elector

(1) A natural person is disqualified from being registered as an elector for a constituency if the person—

- (a) has, in Hong Kong or any other place, been sentenced to death or imprisonment (by whatever name called) and has not either—
 - (i) served the sentence or undergone such other punishment as a competent authority may have substituted for the sentence; or
 - (ii) received a free pardon; or
- (b) on the date of application for registration, is serving a sentence of imprisonment; or
- (c) without limiting paragraph (a), where the election is to be held or is held within 3 years after the date of the person's conviction, is or has been convicted—
 - (i) of having engaged in corrupt or illegal conduct in contravention of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554); or
 - (ii) of an offence against Part II of the Prevention of Bribery Ordinance (Cap. 201); or
 - (iii) of any offence prescribed by regulations in force under the Electoral Affairs Commission Ordinance (Cap. 541); or
(*Replaced 10 of 2000 s. 47*)
- (d) is found under the Mental Health Ordinance (Cap. 136) to be incapable, by reason of mental incapacity, of managing and administering his or her property and affairs; or
(*Replaced 25 of 2003 s. 17*)
- (e) is a member of the armed forces of the Central People's Government or any other country or territory.

(2) This section applies to an authorized representative of a corporate elector in the same way as it applies to an elector who is a natural person.

53. When an elector is disqualified from voting at an election

(1) A person registered as an elector is disqualified from voting at an election if the person—

- (a) in the case of a geographical constituency, has ceased to be eligible to be registered as an elector for such a constituency; or
 - (b) in the case of a functional constituency, has ceased to be a person eligible to be registered as an elector for such a constituency.
(*Amended 48 of 1999 s. 37*)
- (2)-(3) (*Repealed 25 of 2003 s. 36*)
- (4) A person is disqualified from voting at an election as the authorized representative of a corporate elector if the person—
- (a) is no longer eligible to be the authorized representative of the elector; or
 - (b) is not registered as such a representative by the Electoral Registration Officer.
- (5) An elector is also disqualified from voting at an election if the elector— (*Amended 25 of 2003 s. 36*)
- (a) has, in Hong Kong or any other place, been sentenced to death or imprisonment (by whatever name called) and has not either—
 - (i) served the sentence or undergone such other punishment as a competent authority may have substituted for the sentence; or
 - (ii) received a free pardon; or
 - (b) on the date of the election, is serving a sentence of imprisonment; or
 - (c) without limiting paragraph (a), where the election is to be held or is held within 3 years after the date of the person's conviction, is or has been convicted—
 - (i) of having engaged in corrupt or illegal conduct in contravention of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554); or
 - (ii) of an offence against Part II of the Prevention of Bribery Ordinance (Cap. 201); or
 - (iii) of any offence prescribed by regulations in force under the Electoral Affairs Commission Ordinance (Cap. 541); or
(*Replaced 10 of 2000 s. 47*)
 - (d) is found under the Mental Health Ordinance (Cap. 136) to be incapable, by reason of mental incapacity, of managing and administering his or her property and affairs; or
(*Replaced 25 of 2003 s. 36*)
 - (e) is a member of the armed forces of the Central People's Government or any other country or territory.

(6) Subsection (5) applies to the authorized representative of a corporate elector in the same way as it applies to an elector who is a natural person.

District Councils Ordinance

30. When an elector is disqualified from voting at an election

An elector is disqualified from voting at an election if the elector—

- (a) has ceased to be eligible to be registered as an elector under the Legislative Council Ordinance (Cap. 542); or
- (b) has, in Hong Kong, or any other place, been sentenced to death or imprisonment (by whatever name called) and has not either—
 - (i) served the sentence or undergone such other punishment as a competent authority may have substituted for the sentence; or
 - (ii) received a free pardon; or
- (c) on the date of the election, is serving a sentence of imprisonment; or
- (d) without limiting paragraph (b), where the election is to be held or is held within 3 years after the date of the person's conviction, is or has been convicted—
 - (i) of having engaged in corrupt or illegal conduct in contravention of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554); or
 - (ii) of an offence against Part II of the Prevention of Bribery Ordinance (Cap. 201); or
 - (iii) of any offence prescribed by regulations in force under the Electoral Affairs Commission Ordinance (Cap. 541); or
(*Replaced 10 of 2000 s. 47*)
- (e) is found under the Mental Health Ordinance (Cap. 136) to be incapable, by reason of mental incapacity, of managing and administering his or her property and affairs; or (*Amended 33 of 2002 s. 9*)
- (f) is a member of the armed forces of the Central People's Government or any other country or territory.