

Legislative Council Panel on Constitutional Affairs

Results of the Public Consultation on Prisoners' Voting Right and the Proposed Way Forward

At the meeting on 16 February 2009, we sought Members' views on the public consultation document on prisoners' voting right. This paper briefs Members on the development since then and sets out the proposed way forward on the relaxation of the existing restrictions on prisoners' voting right in the light of the views received in the public consultation.

BACKGROUND

The High Court's judgment on Three Judicial Review Cases on Prisoners' Voting Right

2. In August 2008, the Court granted leave to three judicial review ("JR") applications which challenged the constitutionality of the existing across-the-board restrictions on prisoners' right to be registered as electors and to vote under the Legislative Council Ordinance ("LCO") (Cap. 542). Background of the JR cases is at the Annex.

3. After hearing the cases in November 2008, the Court handed down its judgment ("main judgment") on the three JR cases in December 2008. The Court considers that the existing general, automatic, and indiscriminate restrictions on prisoners' right to register as electors and to vote unconstitutional. Arrangements should be made to enable prisoners to vote on the election day. The Court also takes the view that arrangements should be made to enable remanded unconvicted persons to vote on the election day whilst being held in custody.

Latest Developments

(A) Judgment on Relief Granted

4. Another hearing on the JR cases was held on 23 February 2009 during which the Court heard the submissions made by the parties on the appropriate relief (i.e. form of remedies) to be granted. On 11 March 2009, the Court handed down the judgment on the relief granted to the JR cases as summarised below-

- (a) the Court declares that the existing across-the-board restrictions on prisoners' right to be registered as electors and to vote under the LCO unconstitutional;
- (b) the Court also declares that the Electoral Affairs Commission (“EAC”) has a statutory duty to make all necessary arrangements that are within its powers to provide prisoners and remanded unconvicted persons who are registered as electors and are either held in custody or serving sentences of imprisonment to vote on the election day; and
- (c) the Court grants a temporary suspension order in relation to its declaration relating to prisoners’ voting right up to 31 October 2009.

(B) Temporary Suspension Order

5. The granting of the temporary suspension order by the Court enables the Administration to complete the necessary preparations to facilitate prisoners and remanded unconvicted persons to vote in public elections. These include consulting the public on the policy options on prisoners’ voting right, introducing legislative amendments to the relevant electoral legislation into the Legislative Council (“LegCo”) and formulating practical voting arrangements for prisoners and remanded unconvicted persons.

The Public Consultation Exercise

6. In order to take forward the main judgment, the Administration launched a six-week public consultation exercise on prisoners' voting right on 9 February 2009. The exercise ended on 23 March 2009. During the consultation period, a total of 70 submissions were received. The Administration also held two public forums on 6 March and 11 March 2009 respectively and met with organisations interested in this issue to gather their views. An opinion poll was also conducted to further gauge the public's views. Copies of the report on the public consultation exercise have been distributed to LegCo Members separately. The gist of the report is set out in the ensuing paragraphs.

RESULTS OF THE PUBLIC CONSULTATION EXERCISE

Restrictions on Prisoners' Registration Right

7. Amongst the submissions which covered prisoners' registration right, most of them called for removal of the existing disqualification of prisoners from being registered as electors. A majority of the opinions from the public forums also supported removing the said restriction.

Restrictions on Prisoners' Right to Vote

8. In the Consultation Document, we have proposed three policy options for relaxing the existing restrictions on prisoners' voting right-

- (a) Option One is to remove the existing disqualification provisions in section 53(5)(a)-(b) of the LCO, which disqualify all prisoners from voting, while retaining the disqualification of persons convicted of election-related or bribery offences under section 53(5)(c) of the Ordinance;

- (b) Option Two is to disqualify prisoners from voting if they are serving a sentence of imprisonment for a sufficiently long period (say, 10 years or over); and
- (c) Option Three is to disqualify prisoners from voting if they are serving a sentence of imprisonment for a sufficiently long period (say, 10 years or over) while enabling them to resume the right to vote when they are serving the last few years of imprisonment (say, last five years).

9. A total of 34 out of the 70 submissions received (i.e. 49% of the submissions) supported Option One. In addition, 17 submissions (i.e. 24%) supported removing the disqualification provisions in section 53(5)(a)-(b) and, at the same time, called for removal of the disqualification provisions in section 53(5)(c) as well. One submission (i.e. 1%) supported Option Two while two submissions (i.e. 3%) supported Option Three.

10. The result of the opinion survey indicates that a majority of the interviewees (around 57%) supported allowing prisoners to vote irrespective of their length of sentence. Only 34% of them did not support allowing all prisoners to have the right to vote. This includes those who supported Option Two and Option Three.

11. We also note that an opinion poll conducted by another organisation also indicated that a relatively higher proportion of respondents supported allowing all prisoners to have the right to vote, as against disallowing those serving long-term sentences to vote or allowing prisoners serving long-term sentences to vote only in the last few years of imprisonment.

12. Opinions expressed in the public forums were more diverse. A considerable portion of the participants were of the view that prisoners should retain their political rights and should be allowed to vote. On the other hand, quite a few of those who expressed their views considered that

prisoners should not be allowed to vote and suggested that the Government should appeal against the Court's judgment.

Disqualification of Persons convicted of Election-related or Bribery Offences

13. There were different views on whether the existing disqualification of persons convicted of election-related or bribery offences should be retained under the LCO¹. While a high proportion of the interviewees of the opinion survey (about 85%) supported the retention of the existing disqualification of persons convicted of election-related or bribery offences from voting, a considerable number of the submissions received (see paragraph 9 above) and the views gathered at the meetings with organisations interested in the prisoners' voting right issue ("consultation meetings") called for removal of these restrictions.

Practical Voting Arrangements for Prisoners and Remanded Unconvicted Persons

14. According to the submissions received and views gathered in the public forums and consultation meetings, the public generally supported the proposed practical voting arrangements for prisoners and remanded unconvicted persons set out in the consultation document as detailed in paragraphs 15-17 below.

15. On the registered address of eligible prisoners as electors, a majority of the public supported that 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, a majority of the public expressed the view that their last dwelling-place in Hong Kong at which they resided before serving their sentence of

¹ Under section 53(5)(c) of the LCO, persons convicted of having engaged in corrupt or illegal conduct in contravention of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554), an offence against Part II of the Prevention of Bribery Ordinance (Cap.201) and any offence prescribed by regulations in force under the Electoral Affairs Commission Ordinance (Cap. 541) are disqualified from voting within three years after such conviction. This provision is not covered by the JR cases.

imprisonment should be deemed to be their only or principal residence in Hong Kong for the purpose of voter registration.

16. Amongst the views received on canvassing for votes, most of them supported that prisoners should be allowed to access election-related materials by post and through the mass media. There were views that candidates should not be allowed to canvass in person inside prisons due to security concerns.

17. On the practical voting arrangements for prisoners, most of the views gathered agreed that prisoners should vote in person either by arranging mobile polling stations to visit prisons with eligible electors or setting up polling stations inside prisons. As regards the counting arrangement, a majority of the public opined that the ballot papers cast by prisoners should be mixed with those cast by ordinary electors before the ballot papers are counted.

PROPOSALS

(A) Prisoners' Right to be Registered as Electors

18. Under the existing provisions of the LCO, all prisoners are disqualified from being registered as electors and from voting. In the Court's judgment on the three JR cases on prisoners' voting right, the Court considers that the existing restrictions on registration under the LCO is difficult to justify in the sense that it applies regardless of whether the prisoner is expected to be released from prison by the time of the next election. Given that the existing provisions already disqualify a prisoner from voting, the ban on registration is superfluous.

19. In the light of the Court's judgment and the public's support, there is a clear case for removing section 31(1)(a)-(b) under the LCO which disqualify prisoners from being registered as electors.

(B) Prisoners' Voting Right

20. The results of the public consultation exercise have demonstrated that the public largely support the removal of the existing disqualification provisions in section 53(5)(a)-(b) of the LCO, which disqualify all prisoners from voting.

21. There were views that the right to vote is a fundamental political right that should be enjoyed by prisoners, regardless of the crimes they have committed. As prisoners are already penalised for the offences they have committed by serving their sentences of imprisonment, it is unfair to further penalise them by taking away their voting right. In the development of universal franchise, the goal is to allow all persons to vote, irrespective of their sex, race, social status, criminal record, etc. It is also in society's interest to have all persons express their views and vote in regard to government policies and the persons chosen to participate in the governance of society.

22. Options Two and Three specified in the consultation document suggest disqualifying prisoners based on the length of the sentence of imprisonment. While such restrictions can also be found in overseas jurisdictions, there were views that similar to a blanket disenfranchisement, disqualifying prisoners from voting based on the length of the sentence of imprisonment would result in arbitrariness in the disqualification. Although such arrangement is less restrictive than a blanket exclusion of all prisoners from voting, the reasoning of distinguishing "serious offenders" from "less serious offenders" by way of the sentence of imprisonment is not entirely clear. It may be difficult to provide evidence to prove that prisoners serving a long-term sentence would undermine the integrity of the legislature if they are able to exercise the right to vote. The options of disqualifying prisoners from voting based on the length of the sentence of imprisonment may attract legal challenges in future.

23. Having regard to the above analysis, we propose to remove the existing disqualification provisions under section 53(5)(a)-(b) of the LCO.

(C) To Remove Existing Disqualification of Persons convicted of Election-related or Bribery Offences

24. In the opinion survey, a vast majority of respondents supported the retention of the existing disqualification of persons convicted of election-related or bribery offences from voting under section 53(5)(c) of the LCO. There were views in the submissions and public forums that such restrictions could safeguard the integrity of the elections.

25. However, a considerable number of submissions received and the views gathered at the consultation meetings had requested the removal of section 53(5)(c) of the LCO. The rationale is that the right to vote is a fundamental political right which should be enjoyed by every person. As persons convicted of election-related or bribery offences are already penalised for the offences they have committed by, for example, serving their sentences of imprisonment, it is unfair to impose an additional penalty on them by depriving their voting right. There is also no inevitable, obvious and direct relationship between protecting the integrity of the legislature and disqualifying persons convicted of election-related or bribery offences from voting for three years after conviction. It is considered that a person who commits such offences can still rationally consider and decide on political issues that all citizens face in the voting booth.

26. As we are proposing to remove the disqualification of prisoners from voting irrespective of their length of sentences, the retention of the disqualification of persons convicted of election-related or bribery offences may give rise to consistency concerns, in particular given that some in the latter group may not be given imprisonment sentences. It is also noted that in a large number of overseas jurisdictions (including Austria, Sweden, Switzerland, Denmark, Ireland, Iceland, Finland, Canada, Japan, South Africa and Israel), there is no restriction on prisoners' voting right.

27. Having regard to the considerations set out above, we propose to remove section 53(5)(c) of the LCO.

28. Consequentially, we also propose to remove section 31(1)(c) of the LCO which disqualify persons convicted of election-related or bribery offences from being registered as electors within three years after such conviction.

(D) Practical Voting Arrangements for Prisoners and Remanded Unconvicted Persons

29. As the results of the public consultation exercise have also reflected the public's general support of the proposed voting arrangements for prisoners and remanded unconvicted persons set out in paragraphs 14 to 17 above, we propose to implement those arrangements accordingly.

WAY FORWARD

(A) Legislative Amendments

30. Taking into account the Court's judgment on the JR cases and the results of the public consultation, we plan to introduce into the LegCo (and to enact) within the 2008/09 legislative session the Voting by Imprisoned Persons Bill, which provides for amendments to the relevant disqualification provisions under the LCO, the Chief Executive Election Ordinance (Cap. 569), the District Councils Ordinance (Cap. 547) and the Village Representative Election Ordinance (Cap. 576). The provisions on the electors' registered addresses under the LCO will also be amended having regard to the circumstances of prisoners. Apart from that, the subsidiary legislation under the Electoral Affairs Commission Ordinance (Cap. 541) will be amended in order to facilitate prisoners and remanded unconvicted persons to exercise their voting right.

(B) Formulation of Practical Voting Arrangements for Prisoners and Remanded Unconvicted Persons

31. The EAC in conjunction with the relevant law enforcement agencies (“LEAs”) will work out the details of the above practical voting arrangements for prisoners and remanded unconvicted persons.

VIEWS SOUGHT

32. Members are invited to express views on the proposals on the relaxation of the existing restrictions on prisoners’ voting right set out in paragraphs 18-31 above.

Constitutional and Mainland Affairs Bureau
April 2009

**Background of the Judicial Review Cases
on Prisoners' Voting Right**

I. Relevant Legislation

Legislative Council Ordinance

The Legislative Council Ordinance (Cap. 542) (“LCO”) governs, among other things, the registration of electors and conduct of elections for the Legislative Council (“LegCo”) of the Hong Kong Special Administrative Region.

Registration of Electors

2. As provided under section 48 of the LCO, only a registered elector is eligible to vote at a LegCo Election. A registered elector is a person whose name appears on the final register (“FR”) of electors as compiled and published by the Electoral Registration Officer under the Ordinance.

3. All Hong Kong permanent residents aged 18 or above who ordinarily reside in Hong Kong may apply for registration as an elector. Eligible electors may submit the application at any time of the year. However, they need to apply before the statutory deadline¹ of the year if they wish to have their names included in the FR to be published in that year. If the application is made after the deadline, their names will only be recorded in the FR to be published in the subsequent year.

Disqualification from Registration as Electors

4. The LCO also provides for disqualification of persons from being registered as electors. Amongst other disqualification provisions, section 31(1)(a)-(c) of the Ordinance applies to persons convicted of certain types of crimes and to prisoners. 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—

¹ The statutory deadline is 16th July for a District Council election year, and 16th May for other years.

- (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).

Disqualification from Voting

5. The LCO also sets out the arrangements under which a person is disqualified from voting. Section 53(5)(a)-(c) of the LCO specifies the disqualification provisions applicable to persons convicted of certain types of crimes and to prisoners. An elector is disqualified from voting if the elector—

- (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).

II. Applications for Judicial Review

6. On 8 August 2008, Mr. Chan Kin-sum, Simon, a prisoner, applied for leave to apply for Judicial Review (“JR”) to challenge the constitutionality of section 31(1)(b) and 53(5)(b) of the LCO (case no. HCAL 79/2008). Chan also sought an order of Mandamus directing the Electoral Affairs Commission (“EAC”) to provide Hong Kong permanent residents who are serving a custodial sentence access to polling stations for the LegCo Election to be held on 7 September 2008.

7. On 15 August 2008, Mr. Choi Chuen-sun, a prisoner and a registered elector, applied for leave to apply for JR, seeking relief in similar terms as sought by Chan as well as an order of Mandamus directing the EAC to change his address to the prison address in the electoral register (case no. HCAL 83/2008).

8. On 11 August 2008, the Hon Leung Kwok-hung lodged another JR application on similar grounds and sought similar relief as Chan’s application (case no. HCAL 82/2008). He also challenged the constitutionality of section 31(1)(a)(i) and 53(5)(a)(i) of the LCO and sought an order of Mandamus directing the EAC to provide convicted persons and remanded unconvicted persons access to polling stations and/or facilities on 7 September 2008.

9. The Court granted leave to the JR applications on 18 August 2008. The substantive hearings of the JR cases were held in November 2008 and February 2009.