

**LEGISLATIVE COUNCIL PANEL
ON CONSTITUTIONAL AFFAIRS**

**Sections 15(3) and 40(1)(b)(iii) of the
Legislative Council Ordinance**

The Administration has been requested to review sections 15(3) and 40(1)(b)(iii) of the Legislative Council Ordinance (“the Ordinance”) and provide a paper to the Panel for discussion. A copy of a self-explanatory letter from the Clerk to Panel making the request and an extract of the above-mentioned legislative provisions are attached at Annexes A and B respectively. We set out below our response to the points raised in the letter.

2. Sections 15(3) and 40(1)(b)(iii) were added to the Ordinance by way of committee stage amendments to the Legislative Council Bill put forward by the Administration in response to request by the relevant Bills Committee of the then legislature. The rationale for the amendments was that, within the parameters of the Basic Law, disqualification conditions which apply to Legislative Council candidates and to serving Members of the Council should be the same as far as possible.

3. Against this background, it should be clear that section 40(1)(b)(iii) requires each and every Legislative Council candidate to give a promissory oath at the time of nomination to the effect that, if elected, he or she would not do anything during his or her term of office that would result in the circumstances specified in that section. The provisions set out under section 40(1)(b)(iii) are largely based on the disqualification conditions for Legislative Council candidates under section 39. Any breach of any of the provisions under section 40(1)(b)(iii) can be broadly categorised in three ways -

- (a) that breach is also a breach specified under Article 79(1) to (5) of the Basic Law. An example is the acceptance of a government appointment and becoming a public servant; or

- (b) that breach is also a breach specified under Article 79(6) of the Basic Law. An example is conviction of a criminal offence and sentenced to imprisonment for one month or more; or
- (c) that breach is not a specified breach under Article 79(1) to (6) of the Basic Law. An example would be the conviction of an offence under the Prevention of Bribery Ordinance and sentenced to imprisonment of less than one month.

4. In the event of 3(a) above, it will be for the LegCo President to act in accordance with Article 79 of the Basic Law to declare that the relevant LegCo Member is no longer qualified for the office.

5. In the event of 3(b) above, a motion passed by two-thirds of the Members of the LegCo present is required before the LegCo President can declare that the relevant LegCo Member is no longer qualified for the office.

6. In the event of 3(c) above, such breach may, by virtue of section 15(3), constitute the kind of misbehaviour under Article 79(7) of the Basic Law. Then it will be for Members of LegCo to consider whether a censure motion requiring a vote of two-thirds of the members present should be moved. If such a motion is passed by the LegCo, the LegCo President would then act in accordance with Article 79 to declare that the relevant LegCo Member is no longer qualified for the office.

7. There is also the question of what constitutes a breach of the promissory oath made under section 40(1)(b)(iii). We are satisfied that the original intention is to recognise the occurrence of a breach only if both of the following conditions are met -

- (a) that a disqualifying circumstance specified in that section has arisen, and
- (b) that the disqualifying circumstance in (a) above was resulted from a positive act taken by the LegCo Member in question during his or her term of office.

8. We take the point that the present wording does not reflect this intention unambiguously. We have, therefore, reviewed the wording of this section and we propose to amend this section by deleting the words “would result” and replacing them with “results” in the English text, and deleting “積” from the Chinese text.

9. The amendment will also make clear that this provision will also apply to the promissory oaths taken by Members at the time of nomination in the May election. We intend to incorporate this legislative amendment into the electoral bill which the Administration will prepare to provide for the legal framework for the 2000 Legislative Council election.

Constitutional Affairs Bureau
December 1998

CWP709

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HONG KONG SPECIAL ADMINISTRATIVE REGION
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Mr Michael SUEN, JP
Secretary for Constitutional Affairs
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Dear Mr SUEN,

LegCo Panel on Constitutional Affairs

**Sections 15(3) and 40(1)(b)(iii) of the
Legislative Council Ordinance (Cap. 542)**

On the instruction of Hon Andrew WONG Wang-fat, Chairman of the Panel, I am writing in connection with the captioned subject.

Under Article 79(7) of the Basic Law, if a Member is censured for misbehaviour or breach of oath by a vote of two-thirds of the members of the Legislative Council present, the President shall declare that that Member is no longer qualified for office. By virtue of section 15(3) of the Legislative Council Ordinance, the kind of "misbehaviour" for which a Member may be censured under Article 79(7) includes, but is not limited to, a breach of an oath given under section 40(1)(b)(iii) of the Legislative Council Ordinance. A person is required when nominated as a candidate for election to the Council, to give a promissory oath to the effect that, if elected, he will not do anything during his term of office that would give rise to the circumstances specified in section 40(1)(b)(iii)(A) - (I). As you are aware, sections 15(3) and 40(1)(b)(iii)(A) - (I) were added to the Ordinance during the Committee Stage, as proposed by the Administration.

Some Members question whether it is necessary and appropriate for the Legislative Council Ordinance to define, and in such an indirect and artificial manner, certain types of "conduct" to be misbehaviour which could be censured under Article 79(7). Members note that some of the circumstances specified in section 40(1)(b)(iii)(A) - (I) are already covered by Article 79(4) and (6) of the Basic Law.

For instance, it is a breach of the promissory oath if a Legislative Council Member becomes a prescribed public officer as stipulated in section 40(1)(b)(iii) (A)(I). Under Article 79(4), when a Member accepts a government appointment and becomes a public servant, the President of the Legislative Council shall have to declare that the Member is no longer qualified for the office.

These Members also find section 40(1)(b)(iii) (A) - (I) unusual in that it is already a breach of the promissory oath if a Member does something during his or her term of office that would lead to one of the circumstances specified in (A) - (I). It is not necessary for any of the circumstances to actually happen to constitute a breach.

These Members therefore recommend that the need for the Legislative Council Ordinance to provide for certain types of misbehaviour for the purpose of Article 79(7) of the Basic Law, and the need for the existing section 15(3) to remain in the Ordinance, should be reviewed. As the Panel on Constitutional Affairs has been asked to follow up the matter, the Chairman, Hon Andrew WONG requests the Administration to review the two sections in the light of Members' views set out above and report to the Panel. In this connection, please let the Panel have a paper for discussion at the meeting to be held on 21 December 1998.

Given that a bill to provide for the election of the Legislative Council in the year 2000 is being finalised by the Administration, the Chairman suggests that any legislative proposals to address Members' concern on the matter should be incorporated in the bill.

Yours sincerely,

(Mrs Percy MA)

Clerk to Panel

Extract of Legislative Council Ordinance

Section 15 (3)

For the purposes of subsection (1)(e), the kind of misbehaviour for which a Member may be censured under Article 79(-7) of the Basic Law includes (but is not limited to) a breach of an oath given under section 40(1)(b)(iii).

Note: Article 79 of the Basic Law provides as follows:

The President of the Legislative Council of the Hong Kong Special Administrative Region shall declare that a member of the Council is no longer qualified for the office under any of the following circumstances:

- (1) When he or she loses the ability to discharge his or her duties as a result of serious illness or other reasons;
- (2) When he or she, with no valid reason, is absent from meetings for three consecutive months without the consent of the President of the Legislative Council;
- (3) When he or she loses or renounces his or her status as a permanent resident of the Region;
- (4) When he or she accepts a government appointment and becomes a public servant;
- (5) When he or she is bankrupt or fails to comply with a court order to repay debts;
- (6) When he or she is convicted and sentenced to imprisonment for one month or more for a criminal offence committed within or outside the Region and is relieved of his or her duties by a motion passed by two-thirds of the members of the Legislative Council present; and
- (7) When he or she is censured for misbehaviour or breach of oath by a vote of two-thirds of the members of the Legislative Council present.

Section 40(1)

A person is not validly nominated as a candidate for an election for a constituency, or by the Election Committee, unless-

- (a) a deposit has, in the manner prescribed by regulations in force under the Electoral Affairs Commission Ordinance (Cap. 541), been lodged by or on behalf of the person with the Returning Officer concerned; and
- (b) the nomination form includes or is accompanied by-
 - (i) a declaration to the effect that the person will uphold the Basic Law and pledge allegiance to the Hong Kong Special Administrative Region; and
 - (ii) a declaration as to the person's nationality and as to whether or not the person has a right of abode in a country other than the People's Republic of China; and

- (iii) a promissory oath given by the person to the effect that, if elected, he or she will not do anything during his or her term of office that would result in his or her-
 - (A) becoming-
 - (I) a prescribed public officer within the meaning of section 39(5);
or
 - (II) an officer of the Legislative Council (including the Provisional Legislative Council) or a member of staff of The Legislative Council Commission (including The Provisional Legislative Council Commission);
 - (B) being sentenced to death in Hong Kong or any other place;
 - (C) being convicted of treason;
 - (D) being convicted-
 - (I) of a corrupt practice or an illegal practice (other than the illegal practice consisting of a contravention of section 19 of the Corrupt and Illegal Practices Ordinance (Cap. 288)); or
 - (II) of a corrupt or an illegal practice within the meaning of any other enactment providing for the punishment of corrupt or illegal practices; or
 - (III) of any offence under Part II of the Prevention of Bribery Ordinance (Cap. 201); or
 - (IV) of any offence prescribed by regulations in force under the Electoral Affairs Commission Ordinance (Cap, 541);
 - (E) being disqualified from being elected as a Member at an election because of the operation of this or any other law;
 - (F) becoming a representative or salaried functionary of a government of a place outside Hong Kong;
 - (G) becoming a member of any national, regional or municipal legislature, assembly or council of any place outside Hong Kong, other than a people's congress or people's consultative body of the People's Republic of China, whether established at the national or local level;
 - (H) becoming a member of the armed forces of the Central People's Government or any other country or territory; or
 - (I) in the case of a Member elected for a functional constituency, ceasing to have a substantial connection with the constituency.