

Legislative Council Panel on Constitutional Affairs
Consultation Document on Prisoners' Voting Right

INTRODUCTION

At the Panel meeting on 19 January 2009, the Administration briefed Members on the latest developments of three judicial review ("JR") cases on prisoners' voting right and the proposed way forward. On 9 February 2009, we issued the Consultation Document on Prisoners' Voting Right ("the Consultation Document") to consult the public on the relaxation of the ban on prisoners' voting right and the practical voting arrangements for prisoners and remanded unconvicted persons ("remanded persons"). Copies of the Consultation Document have been passed to all Members of the Legislative Council ("LegCo"). This paper summarises the content of the Consultation Document and seek Members' views on the proposals.

BACKGROUND

(A) Legislative Council Ordinance (Cap. 542) ("LCO")

2. Under section 31(1)(a)-(c) of the LCO, 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).
3. Section 53(5)(a)-(c) of the LCO provides that 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).

(B) Applications for JR

4. In August 2008, the Court received three applications for leave to apply for JR to :
- (a) challenge the constitutionality of section 31(1)(b) and 53(5)(b) of the LCO and seek 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 Legislative Council (“LegCo”) Election to be held on 7 September 2008;

- (b) seek relief (i.e. form of remedies) in similar terms as sought in (a) as well as an order of Mandamus directing the EAC to change the applicant’s address to the prison address in the electoral register; and
- (c) challenge the constitutionality of section 31(1)(a)(i) and 53(5)(a)(i) of the LCO and seek 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.

5. The Court granted leave to the JR applications on 18 August 2008 and the substantive hearing was held on 10 to 13 November 2008.

THE COURT’S JUDGMENT

(A) Prisoners’ Voting Right

6. On 8 December 2008, the Court handed down its judgment on the three JR cases. The Court considers that the existing general, automatic, and indiscriminate restrictions on prisoners’ right to vote and the right to register as electors contravene the right to vote constitutionally guaranteed under Article 26 of the Basic Law (“BL”)¹ and Article 21 of the Hong Kong Bill of Rights (“HKBOR”)² specified under section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383). Arrangements should be made to enable prisoners and those convicted persons to vote on the election day.

¹ Article 26 of the BL provides that permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for election in accordance with law.

² Article 21 of the HKBOR 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.

(B) Arrangements for Remanded Persons

7. The Court also takes the view that the constitutional right to vote of remanded persons is not affected by any law, and arrangements should be made to enable them to vote on the election day whilst being held in custody.

(C) Challenge against EAC's Refusal to change the Registered Address

8. The Court considers that the challenge against the EAC's refusal to change one of the applicant's registered address to his prison cell in the register of electors is unfounded and should be dismissed.

NEED FOR PUBLIC CONSULTATION

9. As the existing across-the-board disqualification of prisoners from registration and from voting has been ruled by the Court as unconstitutional, it is necessary for the Administration to formulate policy options on the relaxation of the restrictions.

10. While there are views that the disqualification provisions should be removed totally, there are also views that some reasonable restrictions should be maintained. Given the diverse views of the community, the Administration sees the need to conduct a public consultation exercise.

SUMMARY OF PROPOSALS

11. Taking into account the voting arrangements for prisoners adopted overseas³ and the circumstances in Hong Kong, the Administration has identified the following policy options on the relaxation of the disqualification of prisoners from being registered and from voting in elections.

Policy Option on Prisoners' Right to be Registered as Electors

12. Having considered the Court's judgment that the disqualification from registration is not justifiable and the possible limitations in which a person who has served the sentence may not be able to vote if he has missed the voters' registration deadline, there is a clear case for removing the disqualification of prisoners from applying to be registered. This will enable eligible prisoners to

³ Details of the arrangements adopted overseas are set out in paras 2.6 to 2.7 of the Consultation Document.

register as electors such that they can exercise their voting right once the disqualification from voting (if applicable to them) expires.

Policy Options on Prisoners' Voting Right

13. Under section 53(5)(c) of the LCO, persons convicted of election-related or bribery offences are disqualified from voting within three years after such conviction. The disqualification helps to protect the integrity of the legislature. This provision is not covered by the JR cases and shall remain under the LCO.

14. The disqualification provisions in section 53(5)(a)-(b) have been ruled by the Court as unconstitutional. The Government proposes the following three policy options on the relaxation of the ban on prisoners' voting right-

- (a) Option One is to remove the existing disqualification provisions in section 53(5)(a)-(b) of the LCO. The disqualification of persons convicted of election-related or bribery offences under section 53(5)(c) will remain. Allowing prisoners to vote will help return prisoners as more civic-minded citizens as they will be more connected to society. However, there are also views that serious criminals should be disqualified from voting in order to prevent crime and to enhance civic responsibility and respect for the rule of law.
- (b) Option Two is to disqualify prisoners from voting if they are serving a sentence of imprisonment for a sufficiently long period (for example, 10 years or over). This is to balance between protecting the integrity of the legislature while retaining the voting right for less serious offenders. The length of sentence is used as a criterion to distinguish serious offences from less serious ones. However, there are comments that serious and minor offences cannot be simply defined by the length of the imprisonment sentence.
- (c) Option Three is to disqualify prisoners from voting if they are serving a sentence of imprisonment for a sufficiently long period (for example, 10 years or over) while enabling them to resume the right to vote when they are serving the last few years of imprisonment (for example, during the last five years). To enable prisoners to vote when they are approaching the end of the term of their imprisonment may enhance their civic-mindedness and facilitate their reintegration into society and rehabilitation. However, as the option is also devised on the basis of the length of sentence, similar concerns about the

appropriateness of this criterion for determining the threshold of disqualification may also arise.

Practical Arrangements for Prisoners and Remanded Persons to Vote

15. We have also proposed the following practical arrangements for prisoners and remanded persons to exercise their voting right.

Registered Address of Eligible Prisoners as Electors

- (a) For prisoners who have not yet been registered as electors before they serve their sentence of imprisonment, they may apply to be registered to the address of their home if they continue to maintain a sole or main home outside the prison.
- (b) For prisoners who have already been registered as electors before they serve their sentence of imprisonment, their registered addresses would follow the address of their sole or main home.
- (c) For registered and non-registered prisoners who no longer maintain any sole or main home outside the prison, their last dwelling-place in Hong Kong at which they resided before serving their sentence of imprisonment would be deemed to be their only or principal residence in Hong Kong for the purpose of voter registration.

Canvassing for Votes

- (d) Prisoners may receive electoral documents and election advertisements sent by post.
- (e) Prisoners may have access to the election-related information covered by the mass media such as newspapers, radio and television.

Practical Arrangements

- (f) To consider the following options on the arrangements for the casting of votes :
 - (i) to arrange mobile polling stations to visit prisons with eligible electors; or
 - (ii) to set up polling stations inside prisons.

Postal voting or voting by proxy was also explored. However, they would give rise to concerns about voting confidentiality and vote buying. They are also more susceptible to undue influence and fraud than ballots cast by electors in person inside a polling station.

- (g) To consider reasonable limitation on the polling hours for prisoners (for example, up to 5:00 pm), and to regulate the flow of prisoners in the polling station having regard to the security and the operation of the prisons.

Electoral Arrangements for Remanded Persons

- (h) To work out arrangements for remanded persons to cast their votes which would be similar to those for prisoners.

Counting Arrangements

- (i) Depending on the actual polling arrangement to be adopted, the EAC would need to work out the counting arrangements, including the arrangements for transferring the ballot papers to the relevant counting stations, to be mixed with other ballot papers to ensure the secrecy of votes, etc.

Views Sought

16. Members are invited to express views on this paper which summarises the proposals of the Consultation Document.

Constitutional and Mainland Affairs Bureau
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