

**Legislative Council
Panel on Constitutional Affairs**

**Disqualification of Candidates with Unserved Prison Sentences
and other Related Matters**

PURPOSE

The Administration will publish the Consultation Paper on Disqualification of Candidates with Unserved Prison Sentences and other Related Matters on 21 July 2014. This paper highlights the major issues therein and seeks Members' views on the proposals.

BACKGROUND

2. The Legislative Council Ordinance ("LCO") (Cap. 542) governs, among other things, the conduct of the election of LegCo Members. Section 39 of the LCO sets out the circumstances in which a person is disqualified from being nominated as a candidate at a LegCo election and from being elected as a LegCo Member.

Two Court of First Instance Cases

3. In April 2012, a member of the public and a serving LegCo Member each applied for leave to apply for judicial review against section 39(1)(b)(i) and section 39(1)(d) of the LCO¹. On 21 June 2012, the Court of First Instance ("the CFI") handed down its written judgment ("the Judgment") that section 39(1)(b) of the LCO was inconsistent with Articles 26 and 39 of the Basic Law as well as Article 21 of the Hong Kong Bill of Rights ("HKBOR"). The CFI commented, but made no ruling, on the constitutionality of section 39(1)(d) of the LCO.

4. Section 39(1)(b) and section 39(1)(d) of the LCO specifically relate to disqualification of a person with an unserved sentence of death or imprisonment and a person serving a sentence of imprisonment respectively. These parts of section 39 are extracted below for reference -

¹ *Wong Hin Wai and Leung Kwok Hung v Secretary for Justice*, case no. HCAL 51/2012 and HCAL 54/2012

“(1) A person is disqualified from being nominated as a candidate at an election, and from being elected as a Member, if the person -

...

(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 been substituted for the sentence; or

(ii) received a free pardon; or

...

(d) on the date of nomination, or of the election, is serving a sentence of imprisonment; or”.

5. On 12 July 2012, the Administration announced its decision not to appeal against the Judgment but explained that it considered that section 39(1)(b) was enacted to serve legitimate aims, and there was a need to carefully re-examine the reasons for and against disqualification of candidates at a LegCo election. The Administration considered that there was a need to maintain public confidence in the LegCo and LegCo Members and ensure the LegCo's proper operation, as well as maintain public confidence in the electoral process. The Administration undertook to conduct a review on the qualification of persons with unserved prison sentences as candidates for LegCo elections, consult the public on this matter and other related issues at an appropriate juncture and propose changes to the relevant electoral legislation accordingly if necessary.

CONSIDERATIONS AND RECOMMENDATIONS

6. Candidate disqualification requirements are restrictions on a person's right to stand for election, which right is constitutionally protected under Article 26 of the Basic Law and Article 21 of the HKBOR. As recognised by the CFI, such right is not absolute and can be subject to reasonable and justifiable restrictions which satisfy the proportionality test (i.e. if the restrictions pursue legitimate aim(s), are rationally connected and are proportionate to such aim(s))². The reasonableness of the design features of the electoral system, including candidate disqualification requirements, should also be considered in light of the historical and political development

² The CFI recognised that the criteria for eligibility to stand for election could be considerably stricter than those for voting, but the criteria restricting the right to stand for election must still be subject to the proportionality test.

of a place. Besides, the right to stand for election is also subject to the exception in section 9 of the Hong Kong Bill of Rights Ordinance (Cap. 383)³.

7. After review, the Administration considers that, broadly speaking, the following objectives that the disqualification provisions in the legislative regime aim to serve, which are also recognised by the CFI as legitimate aims, remain valid -

- (i) maintaining public confidence in the LegCo;
- (ii) ensuring the proper operation of the LegCo; and
- (iii) maintaining public confidence in the electoral process.

8. In the Judgment, when considering the constitutionality of section 39(1)(b) of the LCO, the CFI appeared to have been primarily concerned with the specific circumstances of the applicants of the judicial review applications in question⁴, namely persons who have been sentenced to a term of imprisonment of less than three months and are on bail pending appeal against a conviction and sentence by a magistrates' court.

9. On this understanding, whilst the CFI struck down section 39(1)(b) of the LCO as a whole, the Administration is of the view that the CFI's ruling leaves open for argument that the disqualification of persons with unserved sentences but not in exactly the same circumstances of the applicants of the judicial review in question may still be justifiable.

10. It is also noteworthy that the CFI made no ruling on the constitutionality of section 39(1)(d) of the LCO which restricts a person serving a sentence of imprisonment from standing for a LegCo election, and only made some comments on the questions to be addressed in the assessment of the overall reasonableness of that section⁵. The

³ Section 9 of the Hong Kong Bill of Rights Ordinance (Cap. 383) provides that, among other things, persons lawfully detained in penal establishments of whatever character are subject to such restrictions as may from time to time be authorised by law for the preservation of custodial discipline.

⁴ HCAL 51/2012 and HCAL 54/2012

⁵ Whilst the CFI noted that section 39(1)(d) might catch those serving a short prison sentence who would be released by the time the new term of office of LegCo membership commences, it also recognised that a number of questions have to be addressed in the assessment of the overall reasonableness of section 39(1)(d), such as whether a candidate serving a prison sentence should be allowed time out from imprisonment to conduct campaign (arguably the right to stand for election carries with it the right to a fair opportunity to conduct a campaign), whether this question has been considered in other jurisdictions, how this should be balanced against the public interest in the effectiveness of our criminal justice system in terms of punishment by prison sentence, how about security issues if such a candidate is allowed to have time out, etc.

Administration considers that the justifications underpinning the long-established section 39(1)(d) of the LCO remain sound and valid.

Persons on bail pending appeal

11. It is worth noting that a person convicted and sentenced to imprisonment is a person who has been found guilty of the offence. Even though the person may subsequently appeal against the conviction and/or sentence and be released on bail pending appeal, he or she remains guilty of the offence unless and until the conviction is overturned on appeal. Presumption of innocence does not apply to the appellant. Moreover, a person granted bail pending appeal is liable to be imprisoned if his or her conviction and/or sentence is upheld upon appeal. There may be a concern that allowing such person to stand for election could give rise to uncertainty in the electoral process because if the person's appeal is dismissed, he or she will subsequently become disqualified as a candidate.

12. However, we have also considered the aforementioned Judgment, and the fact that the courts, when considering whether or not to grant bail pending appeal, will consider, among other things, the likelihood of the appeal being allowed⁶. Besides, unlike a person serving a sentence of imprisonment (including one who is not granted bail pending appeal and is required to serve the sentence of imprisonment whilst appealing), a person on bail pending appeal is not subject to custodial discipline and his or her liberty is not severely restricted. On balance, the Administration considers that there may be a case to allow a person on bail pending appeal to stand for election, so long as he or she is not otherwise caught by other restrictions under section 39 of the LCO.

13. We consider it desirable to provide for a specific regime in the electoral laws in respect of disqualification (or not) for election-related purposes concerning a person pending appeal, as follows -

- (a) the Administration proposes that an appellant who is released on bail pending appeal, regardless of the court of conviction or appeal, be allowed to be nominated as a candidate at a LegCo election and be elected as a LegCo Member until disposal of the appeal, so long as he or she remains on bail and is not otherwise caught by other restrictions under section 39 of the LCO;

⁶ Please refer to section 83Z of the Criminal Procedure Ordinance (Cap. 221) and the case of *HKSAR v Mohamed Rahoof Mohamed Sajahan*, HCMA 270/2014.

- (b) for an appellant who is currently serving a sentence of imprisonment, in view of the considerations set out in paragraph 12 above, the Administration proposes that such a person should be disqualified from being nominated as a candidate at a LegCo election and from being elected as a LegCo Member, unless and until the person is subsequently granted bail pending appeal; and
- (c) for an appellant who is convicted but is not serving a sentence of imprisonment (e.g. in case of suspended sentence, on early release under supervision), his or her position is similar to that of paragraph 13(a) above, with his or her liberty not severely restricted. Such a person may however be disqualified under other provisions of section 39 of the LCO in relation to the conviction and/or sentence, e.g. section 39(1)(e). The Administration therefore proposes that such a person should be treated similarly as a person under paragraph 13(a) above; nevertheless, we propose that this treatment should not apply to an escaped convict (see paragraph 14 below as well).

Escaped convicts

14. The original section 39(1)(b) of the LCO also covered escaped convicts. A convicted person who escapes justice has not only contravened the law through the initial criminal conduct, but has also evaded the penalty imposed on him or her by a court of law, or has otherwise absconded in breach of the terms and conditions of release, contrary to the confidence and trust placed in him or her. Therefore, the Administration proposes that all escaped convicts be disqualified from being nominated as a candidate and being elected as a LegCo Member.

RELATED ISSUES

Clarification on the qualification of certain categories of persons

(A) *Persons detained in Detention Centres, Training Centres, Drug Addiction Treatment Centres, Rehabilitation Centres or a Correctional Services Department Psychiatric Centre*

15. At present, besides being sentenced to detention in a prison, a person convicted of an offence may be detained in alternative penal establishments under the supervision of the Correctional Services

Department (“CSD”), namely Detention Centres, Training Centres, Drug Addiction Treatment Centres, Rehabilitation Centres and a CSD Psychiatric Centre.

16. While there are different types of correctional institutions managed by CSD under the law, the captioned centres are all custodial in nature. Similar to persons serving sentences of imprisonment, a person serving detention in Detention Centres, Training Centres, Drug Addiction Treatment Centres and Rehabilitation Centres will have his or her liberty restricted to such extent as is consistent with the requirements of the scheme. It is important that a person closely follows and abides by the relevant rules and regulations of the respective schemes so that he or she may fully benefit from such schemes.

17. In view of the above, the Administration considers that there may be a need for clarification in the law that a person serving a sentence of detention in any of the above centres, and a person who has escaped from these centres (including one who has absconded during post-release supervision) are disqualified from being nominated as candidates at a LegCo election and from being elected as LegCo Members.

18. A person may also be ordered to be detained in a CSD Psychiatric Centre which is set apart as a prison pursuant to section 4 of the Prisons Ordinance (Cap. 234) (i.e. Siu Lam Psychiatric Centre) in relation to an offence. Similarly, it is considered important that a person closely follows and abides by the relevant rules and regulations so that he or she may rehabilitate during his or her custody in the CSD Psychiatric Centre. Hence, the Administration also considers that there may be a need for clarification in the law that a person ordered to be detained in a CSD Psychiatric Centre, and a person who has escaped from a CSD Psychiatric Centre are disqualified from being nominated as candidates at a LegCo election and from being elected as LegCo Members.

(B) Prisoners who are subject to early release under supervision

19. Prisoners who are subject to early release under supervision⁷ are so released to facilitate their rehabilitation and reintegration into society. Such persons are, from a legal point of view, persons who have not fully served their sentence. There are views that such persons should not be allowed to stand for election because these persons are subject to supervision

⁷ Pursuant to section 7(1) or (2) of the Prisoners (Release under Supervision) Ordinance (Cap. 325), section 6(1) of the Post-Release Supervision of Prisoners Ordinance (Cap. 475), or section 15(1)(c) of the Long-term Prison Sentences Review Ordinance (Cap. 524).

conditions set out in the relevant supervision order, such as residing at a half-way house during specified hours, restriction on employment, association, etc. Should they be in breach of any of the conditions, they are liable to be recalled to prison, and in some cases liable to be prosecuted for an offence, and if that happens, this would give rise to uncertainty in the electoral process.

20. On the other hand, generally speaking, persons subject to early release under supervision will not be remanded in custody unless they act contrary to the terms and conditions of the supervision order, hence they are capable of preventing their own re-imprisonment. Upon the expiration or discharge of the supervision order, such persons would be treated as having completed their sentence and would not be taken into prison custody. Moreover, in contrast to persons who are serving a custodial sentence and whose liberty is severely restricted, persons who are released under supervision are subject to relatively less severe restrictions on their personal liberty and are in a relatively better position to conduct election campaign or to discharge duties as a LegCo Member.

21. The Administration considers that it is highly important to maintain the integrity of the supervision regime (which is part of the offender's correctional services programme) and the supervision conditions that may be imposed on a person released under supervision and to ensure that they apply and remain fully complied with by the person in question. On the other hand, so long as these supervision conditions continue to prevail and be complied with, and there is no obligation to relax or undermine these conditions to facilitate a candidate at an election to conduct election campaign or to discharge his or her duties as a LegCo Member, the Administration is inclined not to disqualify a convicted person who is released under supervision⁸ from being nominated as a candidate at a LegCo election or from being elected as a LegCo Member on ground that he or she still has an unserved sentence, so long as such a person is not recalled to prison or the relevant alternative penal establishments or otherwise caught by other restrictions under section 39 of the LCO.

22. For the avoidance of doubt, the Administration considers that a person who has been conditionally released under supervision pursuant to a conditional release order made under section 15(1)(b) of the Long-term Prison Sentences Review Ordinance (Cap. 524) should be taken to be serving

⁸ Including also those released under supervision pursuant to section 5(1) of the Training Centres Ordinance (Cap. 280), section 5(1) of the Detention Centres Ordinance (Cap. 239), section 5 of the Drug Addiction Treatment Centres Ordinance (Cap. 244) and section 6(1) of the Rehabilitation Centres Ordinance (Cap. 567).

the sentence within the meaning of section 39(1)(d) of the LCO under the existing legislation⁹ and hence should be disqualified from being nominated as a candidate at a LegCo election or from being elected as a LegCo Member.

(C) *Prisoners granted leave of absence*

23. A prisoner may be granted leave of absence by the Commissioner of Correctional Services of Hong Kong pursuant to rule 17 of the Prison Rules (Cap. 234A). Whilst he or she is temporarily out of custody at the particular time when he or she is granted leave of absence, the position is relatively certain that such a person will be taken into prison custody again very soon (within a maximum of five days) and hence the considerations are no different from those serving a sentence of imprisonment. The Administration therefore proposes that the same disqualification be applied to such a person.

Corresponding amendments to other electoral laws

24. Provisions similar to those in the LCO can be found in other related electoral legislation, such as the Chief Executive Election Ordinance (Cap. 569) (“CEEO”) (covering the elections of both the Chief Executive and the Election Committee)¹⁰, the District Councils Ordinance (Cap. 547) (“DCO”) and the Rural Representative Election Ordinance (Cap. 576) (“RREO”). Having regard to the considerations and proposals in paragraphs 11 to 23 above, the Administration proposes making corresponding changes to relevant provisions in the DCO and the RREO on disqualifying persons from being nominated as a candidate and from being elected.

25. Whilst the circumstances in which a LegCo Member is disqualified from holding office are dealt with under Article 79 of the Basic Law, disqualification of a District Council (“DC”) member/a Rural Representative from holding office is not governed by the Basic Law but specific provisions in the DCO/RREO that are similar to section 39 of LCO. We will consider necessary amendments to the provisions regarding disqualification from holding office with reference to the way forward for the disqualification from standing for election.

⁹ Section 19(4) of the Long-term Prison Sentences Review Ordinance (Cap. 524) provides that a person released under a conditional release order is taken to be serving the sentence, and section 27 of the Ordinance provides that any period under which a person is released under a conditional release order is taken to be a part of the sentence being served by the prisoner.

¹⁰ The Administration proposes not making corresponding changes to the disqualification provisions in the CEEO at this stage pending a later amendment exercise to introduce the electoral arrangements for the 2017 Chief Executive election.

A legal uncertainty relating to disqualification of former DC members and Rural Representatives

26. Under the existing statute, there is legal uncertainty as to whether a DC member who was previously disqualified from holding office on conviction of certain offences and/or sentenced to imprisonment should be disqualified from standing for election for five years counting from the date of conviction (according to section 21(1)(e) of the DCO¹¹) or the date of actual disqualification (according to section 24(2) of the DCO¹²).

27. The Administration proposes that we should take the opportunity to make it clear that the five-year period should be counted with reference to the date of original conviction instead of the date of disqualification (if it is different from the date of conviction), to ensure parity of treatment for all. Similar clarification is proposed to be made to the RREO.

VIEWS SOUGHT

28. The public consultation will commence on 21 July 2014 and end on 30 September 2014. The Administration will collate views from the public and decide the next step in the light of the views received. Members are invited to express views on this paper which summarises the initial recommendations in the Consultation Paper.

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¹¹ Section 21(1)(e) of the DCO stipulates that a person is disqualified from being nominated as a candidate at an election and from being elected as an elected member if the person, where the election is to be held or is held within five years after the date of the person's conviction, is or has been convicted of an offence and sentenced to imprisonment for a term exceeding three months or convicted of some specified types of offences. This provision applies to all persons no matter whether they are former DC members or not.

¹² Section 24(1)(d) of the DCO stipulates that a DC member who is convicted of an offence and sentenced to imprisonment for a term exceeding three months or convicted of some specified types of offences (the same as those in section 21(1)(e) of DCO) after being elected is disqualified from holding office. It is further stipulated in section 24(2) of the DCO that section 24(1)(d) “does not prevent a person from being eligible to be a candidate at an election to be held five years after the disqualification [from holding office]”. It can therefore be interpreted to mean that former DC members who were disqualified from holding office under section 24(1)(d) are disqualified from standing for election within five years after the actual date of disqualification.