

**Legislative Council
Panel on Constitutional Affairs**

**Disqualification of District Council Members and
Rural Representatives with Unserved Prison Sentences
from Holding Office**

PURPOSE

The Administration has reviewed the provisions governing holding office by District Council (“DC”) members and Rural Representatives (“RRs”) who have been convicted of certain offences or sentenced to imprisonment and formulated initial proposals. This paper seeks Members’ views on these proposals.

BACKGROUND

2. On 21 July 2014, the Administration published the Consultation Paper on Disqualification of Candidates with Unserved Prison Sentences and other Related Matters (“the Consultation Paper”), which seeks to obtain public views on the disqualification of persons with unserved prison sentences as candidates at a Legislative Council (“LegCo”) election and other related matters¹. The Administration’s initial proposals are set out in paragraph 5.01 of the Consultation Paper (reproduced at Annex A), including the proposal to make corresponding changes to relevant provisions in the District Councils Ordinance (Cap. 547) (“DCO”) and the Rural Representative Election Ordinance (Cap. 576) (“RREO”) on disqualifying persons from being nominated as a candidate in a DC or RR election and from being elected.

3. In this connection, the Administration has taken the opportunity to review the provisions that govern the eligibility to hold office by LegCo Members, DC members and RRs, because there may be similar though not identical considerations that apply to the provisions governing a person’s eligibility to stand for election as well as the provisions governing a person’s eligibility to hold office, where such a person has been convicted of certain offences and/or sentenced to imprisonment.

¹ This Panel was consulted on the same day the Consultation Paper was published (vide LC Papers No. CB(2)2054/13-14(06) and No. CB(2)2094/13-14). Public consultation for the Consultation Paper was closed on 30 September 2014. The Administration is examining the public views collected, and plans to consult this Panel on the results of the consultation exercise and the Administration’s proposed way forward.

4. In this regard, it should be noted that Article 79(6) of the Basic Law and section 15 of the Legislative Council Ordinance (Cap. 542) (“LCO”) provide for a specific regime governing a LegCo Member’s eligibility to hold office if he or she is convicted and sentenced to imprisonment for one month or more for a criminal offence². The Administration does not propose any change in this regard.

5. For DC members and RRs, the Administration has considered the matter and sets out our consideration and initial proposals in the ensuing paragraphs.

EXISTING REQUIREMENTS

6. Under the existing section 24(1)(d)(i) of the DCO (Annex B) and section 9(1)(d)(i) of the RREO (Annex C), an elected DC member or RR is disqualified from holding office if he or she, after being elected, is convicted of an offence for which the person has been sentenced to imprisonment, whether suspended or not, for a term exceeding three months without the option of a fine in Hong Kong or any other place. With the application of Rule 29 of the Criminal Appeal Rules (“Rule 29”) (Cap. 221A), the practical arrangements are as follows –

- (a) an elected DC member or RR who is convicted and sentenced to imprisonment for a term not exceeding three months would not be disqualified under those provisions;
- (b) an elected DC member or RR who is convicted by the Magistrates’ Courts and sentenced to imprisonment for a term exceeding three months would be disqualified immediately; and
- (c) an elected DC member or RR who is convicted by the District Court or the Court of First Instance and sentenced to imprisonment for a term exceeding three months would be disqualified 10 days after the date of conviction, or, in the event of an appeal, upon the Court of Appeal’s determination.

7. Besides, under the existing sections 24(1)(d)(ii), (iii) and (iv) of the DCO and sections 9(1)(d)(ii), (iii) and (iv) of the RREO, an elected DC member or RR is disqualified from holding office if he or she, after being elected, is

² i.e. the President of the LegCo shall declare that a LegCo Member is no longer qualified for the office when he or she is convicted and sentenced to imprisonment for one month or more for a criminal offence committed within or outside the Hong Kong Special Administrative Region and is relieved of his or her duties by a motion passed by two-thirds of the LegCo Members present.

convicted of having engaged in corrupt or illegal conduct in contravention of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554), of an offence against Part II of the Prevention of Bribery Ordinance (Cap. 201), or of any offence prescribed by regulations in force under the Electoral Affairs Commission Ordinance (Cap. 541). With the application of Rule 29, an elected DC member or RR who is convicted of a specified offence under these Ordinances irrespective of length of sentence by the Magistrates' Courts would be disqualified immediately, while those who are convicted by the District Court or the Court of First Instance would be disqualified 10 days after the date of conviction, or, in the event of an appeal, upon the Court of Appeal's determination.

8. Under the existing section 24(1)(b) of the DCO and section 9(1)(b) of the RREO, an elected DC member or RR is disqualified from holding office if he or she has unserved sentence of death or imprisonment in Hong Kong or any other place. However, given that section 24(1)(d)(i) of the DCO and section 9(1)(d)(i) of the RREO expressly mention a prison term (a term of imprisonment exceeding 3 months), the Home Affairs Department did not rely on section 24(1)(b) of the DCO or section 9(1)(b) of the RREO to disqualify an elected DC member or RR immediately upon his or her sentence to imprisonment merely on the ground that he or she has not yet served his or her sentence. There is also no provision in section 24 of the DCO and section 9 of the RREO which disqualifies a person solely on the ground that he or she is serving a sentence of imprisonment.

PROPOSED REGIME

(1) Persons sentenced to imprisonment after election

9. Having regard to the fact that the existing arrangement has been in place since the enactment of the DCO and RREO, and the fact that an elected DC member or RR is different from a candidate because he or she has gone through the electoral process and been elected into office by the electors, the Administration proposes to maintain that an elected DC member or RR who has been sentenced to imprisonment (whether suspended or not) for a term of three months or less should not be disqualified from holding office (i.e. removed from office), so long as he or she is not otherwise caught by other restrictions under section 24 of the DCO or section 9 of the RREO respectively. On the other hand, if after being elected, an elected DC member or RR is convicted in Hong Kong or any other place, of an offence for which the person has been sentenced to imprisonment, whether suspended or not, for a term exceeding three months without the option of a fine, the Administration proposes to

maintain the existing section 24(1)(d)(i) of DCO and section 9(1)(d)(i) of RREO that he or she will be disqualified from holding office. Besides, the Administration proposes to maintain the existing sections 24(1)(d)(ii), (iii) and (iv) of the DCO and sections 9(1)(d)(ii), (iii) and (iv) of the RREO which disqualify an elected DC member or RR from holding office if he or she, after being elected, is convicted of the specified offences as detailed in paragraph 7 above.

(2) Persons pending appeal

10. In paragraph 3.09 of the Consultation Paper, we proposed not to apply Rule 29 to the electoral laws as it is not specifically tailored for such application and it has not taken into consideration the special issues and problems which its application to the electoral regime would entail. Having regard to the proposed regime in respect of disqualification from standing for election, and the existing arrangement for disqualification from holding office, the Administration proposes that the design of the specific regime in respect of disqualification from holding office (i.e. removal from office) concerning an elected DC member or RR pending appeal should be that, where an elected DC member or RR is convicted of any specified offence or sentenced to imprisonment of such term which would otherwise render him or her disqualified from holding office under the electoral law, such disqualification shall be suspended until –

- (a) the end of the statutory appeal period for defendants (i.e. 14 days for appeal cases from the Magistrates' Courts³ and 28 days for other cases⁴); and
- (b) in the event of a relevant appeal against conviction or sentence (as the case may be), regardless of the court of conviction or appeal, so long as the person is not serving the relevant sentence of imprisonment or detention, until the determination thereof by the appellate court.

³ Section 114 of the Magistrates Ordinance (Cap. 227) provides that the appeal should be made within 14 days after the day of his conviction or the order or determination by the magistrate.

⁴ Section 83Q of the Criminal Procedure Ordinance (Cap. 221) provides that the notice of appeal, or of application for leave to appeal, shall be given within 28 days from the date of the conviction, verdict or finding appealed against, or, in the case of appeal against sentence, from the date on which sentence was passed, or, in the case of an order made or treated as made on conviction, from the date of the making of the order: Provided that, where sentence was passed more than 7 days after the date of conviction, verdict or finding, notice of appeal, or of application for leave to appeal, against the conviction, verdict or finding may be given within 28 days from the date on which sentence was passed. Section 33 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) provides that an application to the CFA for leave to appeal shall be made within 28 days from the date of the decision of the Court of Appeal or the Court of First Instance, as the case may be.

(3) Persons convicted of specified offences or sentenced to imprisonment for a term exceeding three months before election and the suspension of disqualification ends after the person holds office

11. As proposed in the Consultation Paper, an appellant who is convicted of certain specified offences⁵ or sentenced to imprisonment but is not serving a sentence of imprisonment (e.g. released on bail pending appeal, persons on suspended sentence, persons on early release under supervision or persons who have completed their sentences), or a person who is released under supervision⁶, would not be disqualified from being nominated as a candidate at a LegCo election and from being elected as a LegCo Member. The Administration proposes to apply the same arrangements to DC and RR elections, i.e.,

- (a) a person who has been convicted of a specified offence or sentenced to imprisonment would not be disqualified from being nominated as a candidate and from being elected in DC or RR elections whilst pending appeal, as long as he or she is not serving a sentence of imprisonment, or whilst he is released under supervision; and
- (b) however, if, after being elected, his or her appeal is dismissed or he or she is required to serve the relevant sentence or order (e.g. bail is revoked, suspended sentence is activated or he or she is recalled to prison), such a person should be disqualified from holding office under section 24(1)(d) of the DCO or section 9(1)(d) of the RREO, as the case may be.

(4) Escaped convicts

12. On the same considerations as in the case of standing for election (as set out in paragraph 3.13 of the Consultation Paper), the Administration proposes that all escaped convicts should be disqualified from holding office, irrespective of the gravity of his or her offence and punishment or whether he or she is waiting for the determination of an appeal. In other words, the proposed arrangements for persons sentenced to imprisonment for a term of three months or less in paragraph 9 and persons pending appeal in paragraph 10 above should not apply to escaped convicts.

⁵ Including offences as stipulated in sections 39(1)(c), (e)(ii), (e)(iii) and (e)(iv) of the LCO.

⁶ 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), section 15(1)(c) of the Long-term Prison Sentences Review Ordinance (Cap. 524), 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).

(5) Persons detained in Detention Centres, Training Centres, Drug Addiction Treatment Centres, Rehabilitation Centres under the supervision of Correctional Services Department (“CSD”) or a CSD Psychiatric Centre

13. As mentioned in Chapter 4 of the Consultation Paper, 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. 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, in the Consultation Paper, the Administration initially considers that there may be a need to disqualify a person who is serving detention in or who has escaped from the captioned centres from standing for election.

14. On the same considerations as in the case of standing for election and having regard to the more-than-three-month threshold for prison sentence applicable to the disqualification from holding office, the Administration proposes that after being elected, a person who is required to serve detention in Detention Centres, Drug Addiction Treatment Centres, Rehabilitation Centres under the supervision of CSD or a CSD Psychiatric Centre for a period exceeding three months⁷ should be disqualified from holding office.

⁷ With regard to persons detained in a CSD Psychiatric Centre subject to a hospital order, the court may specify in the hospital order the period during which such person should be detained. In these situations, we propose that if the court has ordered that the person be detained for more than three months, such a person should be disqualified from holding office immediately. On the other hand, there are some occasions where the court does not specify in the hospital order the period during which such person should be detained. In these situations, we propose to disqualify the person only after he has actually served detention for more than three months. With regard to persons sentenced to be detained in Detention Centres, Drug Addiction Treatment Centres and Rehabilitation Centres, the court will not specify the duration of detention at the time of sentencing. When a person should be released is subject to review during the course of the detention, having regard to the inmate's progress of rehabilitation, and subject to a statutory maximum period of detention. In these situations, we propose to disqualify the person only after he has actually served detention for more than three months.

15. Since the minimum detention period of Training Centres under the supervision of CSD is six months (i.e. exceeding three months), the Administration proposes that a person, after being elected, who has been sentenced to detention in Training Centres should be immediately disqualified from holding office.

16. The proposed arrangements in paragraph 10 above concerning suspension of disqualification from holding office for certain persons pending appeal are proposed to be applied to persons detained in the captioned centres as well. On the other hand, persons who have escaped from these centres (including those who have absconded during post-release supervision if applicable) should be disqualified from holding office, without being able to benefit from the arrangement in paragraph 10.

(6) Disqualification of appointed and ex officio DC members

17. At present, sections 14 and 19 of the DCO set out the circumstances under which an appointed DC member and ex officio DC member may be disqualified from holding office. As the provisions are largely modelled on section 24 of the DCO in respect of elected DC members and similar considerations largely apply to appointed and ex officio DC members, the Administration proposes that the proposed changes to the disqualification of an elected DC member from holding office should apply to an appointed DC member and ex officio DC member, mutatis mutandis.

VIEWS SOUGHT

18. Members are invited to express views on the initial proposals regarding provisions governing holding office by DC members and RRs who have been convicted of certain offences or sentenced to imprisonment as set out in this paper.

**Constitutional and Mainland Affairs Bureau
October 2014**

**Summary of Recommendations in the Consultation Paper on
Disqualification of Candidates with Unserved Prison Sentences and
other Related Matters**

The Administration's initial recommendations on the major issues are summarised as follows -

- (a) to maintain that any person serving a sentence of imprisonment be disqualified from being nominated as a candidate at a Legislative Council ("LegCo") election and from being elected as a LegCo Member;
- (b) 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 -
 - (i) to allow an appellant who is released on bail pending appeal, regardless of the court of conviction or appeal, 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 Legislative Council Ordinance (Cap. 542) ("LCO");
 - (ii) to disqualify an appellant who is currently serving a sentence of imprisonment 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
 - (iii) to treat an appellant who may be disqualified under other provisions of section 39 of LCO in relation to a conviction and/or sentence similarly as a person under (i) above, so long as the person is not serving a sentence of imprisonment¹ ;
- (c) to disqualify an escaped convict (regardless of whether he or she is waiting for the determination of an appeal) from being nominated as a candidate at a LegCo election and from being elected as a LegCo Member;

¹ Except an escaped convict

- (d) a possible need to disqualify a person who is serving detention in or who has escaped from Detention Centres, Training Centres, Drug Addiction Treatment Centres, Rehabilitation Centres or a Correctional Services Department Psychiatric Centre from being nominated as a candidate at a LegCo election and from being elected as a LegCo Member;
- (e) to allow a convicted person who is released under supervision² to be nominated as a candidate at a LegCo election and be elected as a LegCo Member, so long as he or she remains subject to the full rigours of the supervision regime and conditions, is not recalled to prison or the relevant alternative penal establishments and is not otherwise caught by other restrictions under section 39 of the LCO;
- (f) not to apply the recommendation in (e) above to a person 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);
- (g) to disqualify a person who has been granted leave of absence by the Commissioner of Correctional Services of Hong Kong pursuant to rule 17 of the Prison Rules (Cap. 234A) from being nominated as a candidate at a LegCo election and from being elected as a LegCo Member;
- (h) to make corresponding changes to relevant provisions in the District Councils Ordinance (Cap. 547) (“DCO”) and the Rural Representative Election Ordinance (Cap. 576) (“RREO”) on disqualifying persons from being nominated as a candidate and from being elected, having regard to changes from paragraphs 3.04 to 4.10 of the Consultation Paper; and
- (i) to make changes in the DCO and RREO to make it clear that a District Council member/Rural Representative who was previously disqualified from holding office on conviction of certain offences and/or sentenced to imprisonment as mentioned in paragraph 4.14 of the Consultation Paper will be disqualified from being nominated as a candidate or being elected for five years after the date of conviction (according to section 21(1)(e) of the DCO or section 23(1)(e) of the RREO).

² 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), section 15(1)(c) of the Long-term Prison Sentences Review Ordinance (Cap. 524), 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).

Contents of Section

Chapter:	547	Title:	District Councils Ordinance	Gazette Number:	33 of 2002
Section:	24	Heading:	Disqualification of elected members	Version Date:	27/12/2002

- (1) An elected member is disqualified from holding office if the member-
- (a) becomes-
 - (i) a judicial officer; or
 - (ii) a prescribed public officer; 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) has been convicted of treason; or
 - (d) without limiting paragraph (b), after being elected, is convicted-
 - (i) in Hong Kong or any other place, of an offence for which the person has been sentenced to imprisonment, whether suspended or not, for a term exceeding 3 months without the option of a fine; or
 - (ii) of having engaged in corrupt or illegal conduct in contravention of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap 554); or
 - (iii) of an offence against 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); or (Replaced 10 of 2000 s. 47)
 - (e) is a representative or a salaried functionary of the government of a place outside Hong Kong; or
 - (f) is 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 level or local level; or
 - (g) is an undischarged bankrupt or, within the previous 5 years, has either obtained a discharge in bankruptcy or has entered into a voluntary arrangement within the meaning of the Bankruptcy Ordinance (Cap 6) with the person's creditors, in either case without paying the creditors in full. (Amended 33 of 2002 s. 8)
- (2) Subsection (1)(d) does not prevent a person from being eligible to be a candidate at an election to be held 5 years after the disqualification.
- (3) An elected member is also disqualified from holding office if the person 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. (Amended 33 of 2002 s. 8)
- (4) Subsection (3) does not prevent a person from being eligible to be a candidate at an election if subsequently it is found under the Mental Health Ordinance (Cap 136) that the person has become capable of managing and administering his or her property and affairs. (Amended 33 of 2002 s. 8)
- (5) Subject to subsection (7), an elected member is also disqualified from holding office for the remainder of that member's term of office if the member does not attend meetings of the District Council for 4 consecutive months ("disqualifying period") without obtaining the consent of the Council before the end of that period.
- (6) The disqualifying period under subsection (5) begins on the day next following the date of the meeting of the Council at which the member is first absent without consent.
- (7) If during the disqualifying period no meetings are held or only one meeting is held, that period is extended to end immediately after the 3rd consecutive meeting from which the member is absent.
- (8) An elected member is also disqualified from holding office if the person was not eligible to be nominated as a candidate under section 20.

Contents of Section

Chapter:	576 	Title:	Rural Representative Election Ordinance	Gazette Number:	E.R. 3 of 2014
Section:	9	Heading:	When a Rural Representative is disqualified from holding office*	Version Date:	18/09/2014

Remarks:

According to section 1 of the Rural Representative Election Legislation (Amendment) Ordinance 2014 (5 of 2014) ("the Amendment Ordinance"), the commencement provisions of the Amendment Ordinance are as follows-

- (a) for all purposes relating to the elections of Resident Representatives, Indigenous Inhabitant Representatives and Kaifong Representatives in 2015—the Amendment Ordinance comes into operation on 4 April 2014; and
- (b) in so far as it has not come into operation under paragraph (a)—the Amendment Ordinance comes into operation on 1 April 2015.

(1) A person elected as a Rural Representative is disqualified from holding office if the person- (Amended 5 of 2014 s. 2)

- (a) is a judicial officer;
- (b) has, in Hong Kong or any other place, been sentenced to death or imprisonment (by whatever name called) and has not-
 - (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;
- (c) has been convicted of treason;
- (d) without limiting paragraph (b), after being elected, is convicted-
 - (i) in Hong Kong or any other place, of an offence for which the person has been sentenced to imprisonment, whether suspended or not, for a term exceeding 3 months without the option of a fine;
 - (ii) of having engaged in corrupt or illegal conduct;
 - (iii) of an offence against Part II of the Prevention of Bribery Ordinance (Cap 201); or
 - (iv) of an offence prescribed by the EAC Regulations;
- (e) is a representative or a salaried functionary of the government of a place outside Hong Kong;
- (f) is a member of any national, regional or municipal legislature, assembly or council of a 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 level or local level; or
- (g) is an undischarged bankrupt or, within the previous 5 years, has either obtained a discharge in bankruptcy or has entered into a voluntary arrangement within the meaning of the Bankruptcy Ordinance (Cap 6) with the person's creditors, in either case without paying the creditors in full.

(2) Subsection (1)(d) does not prevent a person from being eligible to be nominated as a candidate at an election to be held after the expiration of 5 years after the date of the person's disqualification.

(3) A person elected as a Rural Representative is disqualified from holding office if the person is found under the Mental Health Ordinance (Cap 136) to be incapable, by reason of mental incapacity, of managing and administering his property and affairs, but a person disqualified under this subsection is eligible to be nominated as a candidate at an election if it is subsequently found under that Ordinance that the person has become capable of managing and administering his property and affairs. (Amended 5 of 2014 s. 2)

(4) A person elected as a Rural Representative for a Rural Area is disqualified from holding office if the person was not eligible to be nominated as a candidate at an election for the Rural Area under section 22. (Amended 5 of 2014 s. 2)

(5) A person elected as a Resident Representative for an Existing Village is disqualified from holding office if, at any time after the election, the person ceases to be a resident of the Village.

(6) A person elected as a Kaifong Representative for a Market Town is disqualified from holding office if, at any time after the election, the person ceases to be a resident of the Market Town. (Added 5 of 2014 s. 7)

Note:

* (Amended 5 of 2014 s. 2)