Legislative Council
Panel on Constitutional Affairs

Results of the Public Consultation on Disqualification of Candidates with Unserved Prison Sentences and other Related Matters and Proposed Way Forward

PURPOSE

The Administration conducted the Public Consultation on Disqualification of Candidates with Unserved Prison Sentences and other Related Matters from 21 July to 30 September 2014. This paper sets out the results of the consultation exercise and seeks Members' views on the Administration's proposed way forward.

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"), to solicit public views on the disqualification of persons with unserved prison sentences as candidates at a Legislative Council ("LegCo") election and other related matters[1].

RESULTS OF THE CONSULTATION EXERCISE

3. During the consultation period, a total of 18 submissions were received from individuals and organisations in response to the Consultation Paper. The submissions are reproduced at **Annex A**.

Objectives of the disqualification provisions

4. As mentioned in the Consultation Paper, the disqualification provisions in the legislative regime aim to serve three objectives, namely, maintaining public confidence in the LegCo; ensuring the proper operation of the LegCo; and maintaining public confidence in the

[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).

electoral process. These objectives are recognised by the Court of First Instance ("the CFI") as legitimate aims and remain valid[2].

5. Among the 18 submissions received, two considered that none of the categories of persons mentioned in the Consultation Paper should be disqualified from standing in a LegCo election[3] but the other 16 submissions did not object to imposing certain restrictions to disqualify persons with unserved prison sentences from standing for election. In other words, the vast majority of the respondents are in favour of maintaining certain restrictions.

Views received on the initial recommendations and the Administration's initial responses

6. The Administration has set out in Chapter Five of the Consultation Paper its initial recommendations on the major issues regarding disqualification from being nominated as a candidate and from being elected. Generally speaking, more submissions are in support of our initial recommendations than those which are not. The arguments for and against our initial recommendations as presented in the submissions are also largely the same as those which have been considered by us in formulating the initial recommendations. The detailed analysis of the views received during the public consultation on each of the initial recommendations and the Administration's initial responses to the public views collected are set out in **Annex B**; the key arguments are set out in paragraphs 7 to 20 below.

Persons serving a sentence of imprisonment

7. At present, section 39(1)(d) of the Legislative Council Ordinance (Cap. 542) ("LCO") disqualifies a person who is serving a sentence of imprisonment on the date of nomination or of the election from being nominated or being elected. Our initial recommendation is to maintain this provision, and this is supported by a majority of the submissions received.

8. However, the Hong Kong Bar Association ("HKBA") is of the view that the HKSAR Government has failed to justify section 39(1)(d)

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[2] See paragraph 85 of the CFI's judgment in *Wong Hin Wai and Leung Kwok Hung v Secretary for Justice*, case no. HCAL 51/2012 and HCAL 54/2012

[3] Their arguments include that people with current or past criminal history are still members of the society entitled to the right to stand for election; Hong Kong people should have the right to elect whoever they believe will best represent them; and many criminal offences under Hong Kong statuteare petty in nature, resulting in people being disqualified for trivial matters .

of the LCO as a proportionate restriction of the constitutionally guaranteed fundamental right of HKSAR permanent residents to stand in elections because, inter alia section 39(1)(d) applies irrespective of the length of the unserved term of imprisonment. The Law Society of Hong Kong ("the Law Society") also considers that the gravity of the consequence attached to section 39(1)(d) of the LCO is disproportionate to its aims because, inter alia, the provision operates indiscriminately, irrespective of the nature, seriousness, relevancy and culpability of the offence committed. The Law Society has made several alternative proposals in its submission[4].

9. Our initial response to HKBA's and the Law Society's views[5] is that section 39(1)(d) is still a justified restriction because of the following reasons –

(a) the right to stand for election is not absolute and can be subject to reasonable and justifiable restrictions which satisfy the proportionality test. More specifically, the right to stand for election is subject to the exception in section 9 of the Hong Kong Bill of Rights Ordinance (Cap. 383)[6];

(b) generally speaking, the imposition of a prison term is indicative of the culpability of the offender and the seriousness of the offending conduct. The submissions received also broadly support that if a person has been sentenced to imprisonment by a court of law, he or she should not be regarded as a suitable candidate for an important public office at least until the sentence has been fully served; and

(c) whilst the CFI notes that section 39(1)(d) may catch those serving a short prison sentence who may have been released by the time the new term of office of LegCo membership commences, it also recognises that a number of questions have to be addressed in the assessment of the overall reasonableness

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[4] The Law Society has proposed repealing section 39(1)(d); or disqualifying a person only if he is serving a sentence of imprisonment on the date of nomination rather than on the date of the election; or maintaining section 39(1)(d) whilst specifying that the length of sentence which would lead to disqualification should be no less than one month; or establishing an independent body to examine each case individually based on its own merits and circumstances.

[5] HKBA's and the Law Society's detailed comments can be found in submissions Nos. 07 and 17 of **Annex A**. Our detailed initial responses are set out in paragraphs 7-15 of **Annex B**.

[6] 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 restriction as may from time to time be authorised by law for the preservation of custodial discipline.

of section 39(1)(d)[7]. Our assessment is that allowing an imprisoned person timeout from imprisonment, as well as frequent visits and other forms of outside contacts for the purpose of conducting election campaigns will give rise to operational, logistics, manpower resource and security problems. This will also put the concerned election candidates (or elected Members, as the case may be) in a privileged position as compared to other prisoners in custody and give rise to an issue of equality to the detriment of penal institution management. There is also concern that the system may be open to abuse. The essence of a custodial sentence will also be undermined, if not impaired, and purpose defeated, and the public interest in the integrity and effectiveness of our criminal justice system will be adversely affected. It is also worth noting that in other jurisdictions, it is not uncommon that restrictions are imposed by law to restrict a person sentenced to a term of imprisonment from being nominated to stand for election; in this regard, it is worth noting that Canada and New Zealand similarly disqualify an imprisoned person, regardless of the length of imprisonment, from being a candidate.

Persons pending appeal

10. To address the CFI's concerns about persons sentenced by a Magistrates' Court to a term of imprisonment of three months or less and who are on bail pending appeal which led to the striking down of section 39(1)(b) of the LCO, in the Consultation Paper we proposed to provide for a specific regime in the electoral laws in respect of disqualification or otherwise for election-related purposes concerning a person pending appeal[8], as follows –

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[7] Such as whether a candidate serving a prison sentence should be allowed timeout from imprisonment to conduct campaign (arguably the right to stand for election carries with it the right to 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, and how about security issues if such a candidate is allowed to have timeout, etc.

[8] "Pending appeal" in this context includes (a) the statutory period of 14 or 28 days for defendants to lodge an appeal or apply for leave to appeal against his conviction/ sentence of imprisonment in a Hong Kong law court; or (b) the period when the convicted person has lodged an appeal to the appellate cour or has applied for leave to appeal until the determination of the appeal. For (a), if the conviction / sentence of imprisonment is handed down by a law court outside Hong Kong, the relevant period is (i) the statutory period allowed by the concerned jurisdiction outside Hong Kong for defendants to lodge an appeal or apply for leave to appeal or (ii) 28 days, whichever is the shorter.

(a) 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 LCO;

(b) 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[9]; and

(c) 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 (a) above, so long as the person is not serving a sentence of imprisonment[10].

11. Among the submissions received, more are in favour of our proposed specific regime. A few submissions however express reservation on allowing persons on bail pending appeal to be nominated as a candidate or be elected, mainly on the grounds that this may cause uncertainty in the electoral process and the persons concerned are already convicted of offences and hence presumption of innocence does not apply to them.

12. When we prepared the proposal in paragraph 10 above to consult the public, we have taken into account that (a) the court, in considering whether or not to grant bail pending appeal, will consider, among other things, the likelihood of the appeal being allowed; and (b), a person on bail pending appeal is not subject to custodial discipline and his or her liberty is not severely restricted, and hence it might be disproportionate to disqualify such persons from standing for election. The views received during the public consultation do not contain any cogent argument against these considerations, we therefore propose to maintain the initial recommendation.

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[9] If an appellant who was serving a sentence of imprisonment is subsequently granted bail before being nominated, such a person will 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.

[10] Except an escaped convict, see paragraph 13 below.

Escaped convicts

13. Among the submissions received, more are in support of our initial recommendation of disqualifying 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. Whilst noting HKBA and the Law Society's views that it would be rare and difficult to envisage an escaped convict standing for election, our initial view is that it is reasonable as a matter of principle to restrict an escaped convict from standing for election, and to expressly provide for this in law.

Related issues

14. As related issues, we have also made the following initial recommendations in the Consultation Paper[11] –

(a) 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 ("CSD") Psychiatric Centre from being nominated as a candidate at a LegCo election and from being elected as a LegCo Member;

(b) to allow a convicted person who is released under supervision[12] 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;

[11] Paragraphs 14(a) to (d) aim to remove ambiguities in whether or not different types of persons under the Correctional Services Department's jurisdiction according to relevant ordinances are disqualified from being nominated as a candidate at a LegCo election or being elected as a LegCo Member.

[12] 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) or section 6(1) of the Rehabilitation Centres Ordinance (Cap. 567) as proposed in the Consultation Paper. We also propose that persons released under supervision under section 109AA of the Criminal Procedure Ordinance (Cap. 221) should be covered as well.

(c) not to apply the recommendation in (b) 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);

(d) 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[13];

(e) 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 7, 10, 13 and 14(a) to 14(d) above; and

(f) to make changes in the DCO and the RREO to make it clear that a District Council ("DC") member/Rural Representative who was previously disqualified from holding office on conviction of certain offences and/or sentenced to imprisonment 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).

15. Among the public views received in respect of paragraphs 14(a) to (f) above, except for paragraph 14(b), more are in support of the concerned initial recommendations, and hence we consider that these initial recommendations should be maintained. However, there are notable differences in opinion regarding paragraphs 14(b) and (e).

Persons released under supervision

16. For paragraph 14(b) above, our initial recommendation is to allow a convicted person who is released under supervision to be nominated as a candidate at a LegCo election and be elected as a LegCo Member. Of the submissions which have commented on this proposal, half are in support while the other half are against. The reasons for opposition are mainly the uncertainty in the electoral process that may be

[13] We further propose that a person who has been granted leave of absence from detention in the alternative penal establishments under the supervision of CSD should similarly be disqualified.

caused, the adverse effect on public confidence in the LegCo and the proper operation of the LegCo, the risks of a convicted person released under supervision failing to comply with the conditions set out in the supervision order while conducting election campaigns or carrying out his or her duties and functions as a LegCo Member, and the difficulty so arising in enforcing such an order.

17. While these are valid arguments, we consider that they need to be balanced against the following considerations: (a) generally speaking, such persons 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; (b) upon the expiration or discharge of the supervision order, such persons would be treated as having completed their sentence; (c) 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. On balance, we consider it hard to justify that disqualifying such persons from being nominated is proportionate, and consider that our initial proposal should remain.

Making corresponding changes to DC and Rural Representative elections

18. On the initial recommendation of 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 in paragraph 14(e) above, HKBA considers that it may be justified to put in place more relaxed disqualification provisions for these electoral institutions than for LegCo, taking account of the functions and duties of these electoral institutions and their more intimate connections with the community (hence greater participation from willing members of the public should be enabled and encouraged).

19. We consider that whilst DC members and Rural Representatives do not assume the same constitutional role of a member of the legislature, they nevertheless still perform an important role in the public administration framework in Hong Kong, and in advising the Government on district administration, rural and other affairs. Hence, we consider that the three objectives in paragraph 4 above should also apply to the elections of DC members and Rural Representatives, and our initial recommendation should be maintained.

20. In summary, after taking into consideration the views received during the public consultation, our recommendations regarding disqualification from being nominated as a candidate and from being elected are set out in **Annex C**.

DISQUALIFICATION OF DC MEMBERS AND RURAL REPRESENTATIVES WITH UNSERVED PRISON SENTENCES FROM HOLDING OFFICE

21. At the meeting of this Panel on 20 October 2014, we sought Members' views on the initial proposals regarding disqualification of DC members and Rural Representatives with unserved prison sentences from holding office (vide LC Paper No. CB(2)68/14-15(01)).

22. While this Panel supported our initial proposals in principle, a few Members raised their comments on some specific issues. Having considered those comments, the Administration's responses are set out in paragraphs 23 to 28 below.

Convictions and sentences outside Hong Kong

23. At the meeting on 20 October 2014, a Member considered that it might not be fair for the provisions disqualifying DC members and Rural Representatives from holding office (i.e., section 24(1)(d)(i) of DCO and section 9(1)(d)(i) of RREO) to cover convictions and sentences outside Hong Kong because the criminal justice system of other places might be different from that of Hong Kong and some conducts which are unlawful in places outside Hong Kong might be lawful in Hong Kong.

24. The Administration considers that the existing disqualification provisions aim to prevent a person who has committed reasonably serious offences in Hong Kong or any other place from continuing to be a DC member/a Rural Representative, to maintain public trust and confidence in the relevant council or committee, and to achieve the objectives set out in paragraph 4 above. As such, the provision should also apply to persons convicted or sentenced to imprisonment in jurisdictions outside Hong Kong. A person is expected to abide by the law of a place where he/she is in, and where the person is found to have contravened the laws of that place and convicted by its courts of a criminal offence, this may raise questions over the person's credibility and integrity.

25. On balance, the Administration's initial proposal is to maintain the existing disqualification provisions (i.e. section 24(1)(d)(i) of DCO and section 9(1)(d)(i) of RREO) to cover convictions and sentences outside Hong Kong.

Appeal against a conviction or sentence of imprisonment outside Hong Kong

26. At the meeting on 20 October 2014, a Member asked whether disqualification of a DC member or a Rural Representative from holding office would be suspended for an appeal against a conviction or sentence of imprisonment outside Hong Kong.

27. The Administration's initial recommendation in this regard is that we should provide for suspension of disqualification in such "pending appeal" cases, with reference to the specific regime proposed at the last meeting and footnote 8 above. The detailed regime is set out in point (d) of **Annex D**.

28. In summary, taking into consideration views received at the last meeting, our recommendations regarding disqualification from holding office are set out in **Annex D**.

VIEWS SOUGHT

29. Members are invited to express views on the Administration's proposed recommendations regarding disqualification from being nominated as a candidate and from being elected in a LegCo, DC or Rural Representative election as summarised in **Annex C**, and the proposed recommendations regarding disqualification of DC members and Rural Representatives from holding office as summarised in **Annex D**. The Administration will consider Members' views and finalise our recommendations in the consultation report to be published. We plan to implement the recommendations through an amendment bill to be introduced in the 2014-15 legislative session.

Constitutional and Mainland Affairs Bureau
November 2014

未服監禁刑罰人士喪失成為候選人的資格及其他相關事宜公眾諮詢

to:
disqualification_consultation@cmab.gov.hk
28/07/2014 21:24
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From:
To: disqualification_consultation@cmab.gov.hk,
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本人同意政府的建議，但該等人士參選時，應向選民清楚申報自己是在上訴、保釋或監管下保釋的事實，因為選民有權知道這些參選人的參選及當選資格含有不確定性。謝謝！

PC Chan

政制及內地事務局

譚志源局長:

你好!現行《立法會條例》內有關禁止被判囚但未服刑人士參選立法會的條文,早前被法院裁定違反《基本法》及《香港人權法案》.港府檢討後,建議修例.容許正在保釋等候上訴及獲准緩刑的被判囚人士參選立法會,但被判囚逾三個月人士,則一律在被定罪後五年內都不得參選.當局就有關建議展開公眾諮詢.

法院的裁決是神聖的,但是,很多時會出現要求司法覆核或要求上訴,也即是說:法院的裁決,也有商榷的可能.我們認爲:現行《立法會條例》內有關禁止被判囚但未服刑人士參選立法會的條文,沒有違反《基本法》及《香港人權法案》.被判囚的人,是因爲他犯法而受法律制裁.若他在等候上訴期間,又有犯罪行爲,上訴法庭可能會加刑而對他判囚逾三個月,屆時再取消他的參選立法會資格,何必多此一舉.立法會議員梁國雄,早前被法庭判囚,他利用上訴施延時間,到立法會議員選舉期間,取消上訴,即時入獄,在監獄中進行競選立法會議員的宣傳,騙取選民的同情票.

現行《立法會條例》內有關禁止被判囚但未服刑人士參選立法會條文,並沒有違反《基本法》及《香港人權法案》.

香港數十年來,社會經歷過多次動亂,立法會(即以前的《立法局》)也有議員被判囚而制訂有關的法律和條例.該等法律和條例,經歷數十年,十分有效,不應隨便修改.

立法會的「拉布」,積累了很多未解決的事項,若想由立法會解決問題,真是難之又難.有效之方法是採用上訴或司法覆核的方法,使現行《立法會條例》內有關禁止被判囚但未服刑人士參選立法會的條文.保留原有條文.未知《香港人權法案》何時制定,是否經公眾諮詢.早前有人提出「監管法官判案」的恐嚇性言論,是否應立例制裁?

祝工作順利

一群老友記　敬上 2014 年 8 月 2 日

本人對《未服監禁刑罰人士喪失成為候選人資格及其他相關事宜諮詢文件》的意見

to:
disqualification_consultation@cmab.gov.hk
13/08/2014 02:14
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From:
To: "disqualification_consultation@cmab.gov.hk" <disqualification_consultation@cmab.gov.hk>,
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以下是本人對《未服監禁刑罰人士喪失成為候選人資格及其他相關事宜諮詢文件》(下稱「諮詢文件」)的意見，如要公開刊登，請不要公開本人的電郵地址及其他有關本人的個人隱私資料(本人的姓名及意見除外)，謝謝！

就諮詢文件5.01(a)的建議，本人贊成香港特別行政區政府維持任何正因服刑而受監禁人士喪失在立法會選舉中獲提名為候選人或當選為立法會議員的資格規定。

因為他們因服刑而受監禁，人身自由受到限制，無法進行競選活動或履行立法會議員職責；同時此舉符合《中華人民共和國香港特別行政區基本法》第79條第6款，以及《立法會條例》第39條(1)(d)；此外，此舉對正因服刑而受監禁的普通香港居民而言都是公平，沒有特權。

就諮詢文件5.01(b)(i)的建議，本人贊成不論上訴案件來自任何等級的法庭，只要獲准保釋等候上訴的人士仍然獲准保釋，並且沒有受到《立法會條例》第39條的其他規定所限制，香港特別行政區政府應該要容許獲准保釋等候上訴的人士在立法會選舉中獲提名為候選人及當選為立法會議員，直至上訴獲得處置為止。

因為他們的人身自由相對受到較少限制或者沒有限制，能夠進行競選活動及履行立法會議員職責。

就諮詢文件5.01(b)(ii)的建議，本人贊成香港特別行政區政府宣告正服刑而受監禁的上訴人士喪失在立法會選舉中獲提名為候選人或當選為立法會議員的資格，除非及直至該人士其後獲准保釋等候上訴。

因為他們因服刑而受監禁，人身自由受到限制，無法進行競選活動或履行立法會議員職責；同時此舉符合《中華人民共和國香港特別行政區基本法》第79條第6款，以及《立法會條例》第39條(1)(d)；此外，此舉對正因服刑而受監禁的普通香港居民而言都是公平，沒有特權。

就諮詢文件5.01(b)(iii)的建議，本人贊成因被定罪及/或判刑而可能根據《立法會條例》第39條的其他規定而被取消資格的上訴人士，只要並非正服刑而受監禁(逃犯除外)，便按上文第(i)點人士(即獲准保釋等候上訴的人士)的類似方法處理。

因為他們的人身自由相對受到較少限制或者沒有限制，能夠進行競選活動及履

行立法會議員職責。

就諮詢文件5.01(c)的建議，本人贊成香港特別行政區政府宣告不論逃犯是否正等候上訴判決，均喪失在立法會選舉中獲提名為候選人及當選為立法會議員的資格。

因為他們違反與選舉、服刑、上訴等相關法律，假如香港特別行政區政府容許他們成為立法會選舉候選人或當選為立法會議員，會破壞立法會的公信力、正當性(又叫合法性、認受性)，不能保證立法會能公正地履行職責。

就諮詢文件5.01(d)的建議，本人贊成香港特別行政區政府有需要規定被羈留在勞教中心、教導所、戒毒所、更生中心或懲教署的精神病治療中心的人士或從這些懲治機構逃走的人士喪失立法會選舉中獲提名為候選人及當選為立法會議員的資格。

因為被羈留在勞教中心、教導所、戒毒所、更生中心或懲教署的精神病治療中心的人士因服刑而受監禁、強制勞動、強制教育或強制治療，人身自由受到限制，或者精神/心理方面出現問題，無法進行競選活動或履行立法會議員職責；同時此舉符合《中華人民共和國香港特別行政區基本法》第79條第6款，以及《立法會條例》第39條(1)(d)；此外，此舉對正因服刑而受監禁的普通香港居民而言都是公平，沒有特權。

而從這些懲治機構逃走的人士違反與選舉、服刑、上訴等相關法律，若香港特別行政區政府容許他們成為立法會選舉候選人或當選為立法會議員，會破壞立法會的公信力、正當性(又叫合法性、認受性)，不能保證立法會能公正地履行職責。

就諮詢文件5.01(e)的建議，本人反對在監管下釋放的被定罪人士，只要遵守監管制度下的所有條件、沒有被召回監獄或相關的懲治機構，以及並非受《立法會條例》第39條的其他規定所限制，香港特別行政區政府便容許其在立法會選舉中獲提名為候選人及當選為立法會議員。

因為他們是被定罪人士，本來因服刑而受監禁，即使他們根據《長期監禁刑罰覆核條例》第15(1)(b)條的有條件釋放令在監管下獲釋，他們都是正在服刑，只是他們的人身自由相對受到較少限制。倘若香港特別行政區政府容許他們成為立法會選舉候選人或當選為立法會議員，會破壞立法會的公信力、正當性(又叫合法性、認受性)，不能保證立法會能公正地履行職責。同時此舉違反《中華人民共和國香港特別行政區基本法》第79條第6款。

就諮詢文件5.01(f)的建議，本人贊成以上(e)點的建議不適用於根據《長期監禁刑罰覆核條例》(第524章)第15(1)(b)條的有條件釋放令在監管下獲釋的人士。

因為他們是被定罪人士，本來因服刑而受監禁，即使他們根據《長期監禁刑罰覆核條例》第15(1)(b)條的有條件釋放令在監管下獲釋，他們都是正在服刑，只是他們的人身自由相對受到較少限制。香港特別行政區政府不容許他們成為立法會選舉候選人或當選為立法會議員，會保證立法會的公信力、正當性(又叫合法性、認受性)，保證立法會能公正地履行職責。同時此舉符合《中華人民共和國香港特別行政區基本法》第79條第6款。

就諮詢文件5.01(g)的建議，本人贊成香港特別行政區政府宣告以懲教署署長根據《監獄規則》(第234A章)第17條給予外出許可人士，喪失立法會選舉中獲提名為候選人及當選為立法會議員的資格。

因為他們是被定罪人士，本來因服刑而受監禁，即使他們根據《監獄規則》第17條給予外出許可，他們都是正在服刑，只是在外出期間，他們的人身自由相對受到較少限制，而且外出後最多五天內被送回監獄，人身自由受到限制。香港特別行政區政府不容許他們成為立法會選舉候選人或當選為立法會議員，會保證立法會的公信力、正當性(又叫合法性、認受性)，保證立法會能公正地履行職責。同時此舉符合《中華人民共和國香港特別行政區基本法》第79條第6款。

就諮詢文件5.01(h)的建議，本人基本上贊成香港特別行政區政府因應諮詢文件第3.04段至第4.10段的改變，相應修訂《區議會條例》及《鄉郊代表選舉條例》關於喪失選舉中獲提名為候選人及當選資格的條文。

不過，本人反對因應諮詢文件第4.08段的改變，相應修訂《區議會條例》及《鄉郊代表選舉條例》關於喪失選舉中獲提名為候選人及當選資格的條文。使監管下釋放的被定罪人士，只要遵守監管制度下的所有條件、沒有被召回監獄或相關的懲治機構，以及並非受《區議會條例》或《鄉郊代表選舉條例》的其他規定所限制，香港特別行政區政府便容許其在區議會選舉/鄉郊代表選舉中獲提名為候選人及當選為區議員/鄉郊代表。

因為他們是被定罪人士，本來因服刑而受監禁，即使他們根據《長期監禁刑罰覆核條例》第15(1)(b)條的有條件釋放令在監管下獲釋，他們都是正在服刑，只是他們的人身自由相對受到較少限制。倘若香港特別行政區政府容許他們成為候選人或當選為區議員/鄉郊代表，會破壞區議會/鄉郊代表的公信力、正當性(又叫合法性、認受性)，不能保證區議會/鄉郊代表能公正地履行職責。

就諮詢文件5.01(i)的建議，本人贊成香港特別行政區政府修訂《區議會條例》及《鄉郊代表選舉條例》，清楚規定區議員／鄉郊代表因上文第 4.14 段所述被裁定干犯某些罪行及／或判監而喪失擔任議員的資格，應（按《區議會條例》第21(1)(e)條或《鄉郊代表選舉條例》第 23(1)(e)條的規定）由其被定罪的日期後的五年內喪失獲提名為候選人或當選的資格。

因為此舉能在處理喪失擔任議員/鄉郊代表資格日期計算問題上以示人人平等，避免有些被裁定干犯某些罪行及／或判監而喪失議員資格的區議員/鄉郊代表，由其定罪的日期起計的五年內喪失參選資格，而有些區議員/鄉郊代表由喪失擔任議員資格的日期起計的五年內喪失參選資格，導致出現法律爭議、區議會或/及鄉郊代表公信力、正當性(又叫認受性、合法性)減弱。

關於未服監禁刑罰人士在立法會選舉中喪失成為候選人的資格之公眾諮詢 - 市民之個人回應 - 2014年8月

to:
disqualification_consultation@cmab.gov.hk
18/08/2014 12:32
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From:
To: "disqualification_consultation@cmab.gov.hk" <disqualification_consultation@cmab.gov.hk>,
History: This message has been replied to.

1 Attachment

未服監禁刑罰人士在立法會選舉中喪失成為候選人的資格之公眾諮詢 - 市民之個人回應.doc

政制及內地事務局：

關於未服監禁刑罰人士在立法會選舉中喪失成為候選人的資格之公眾諮詢，本人之想法已載於附件，敬請閱覽；另本人希望個人資料保密，謝謝。

(署名來函)

未服監禁刑罰人士在立法會選舉中喪失成為候選人的資格之公眾諮詢
市民之個人回應

個人有感此諮詢文件內容議題集中，背景資料充足，引用資料組織有序並便於理解和運用，分析客觀清楚，所傾向之立場有合理依據。

有關徵求意見的內容，個人的想法如下，盼　貴局考慮：

5.01 (a) 本人同意此建議。

(b) (i) 本人對此沒有異議，宜獲得政治界及公眾的認同。

(ii) 本人同意此建議。

(iii) 本人對此沒有異議，宜獲得法律界及政治界的一般認同。

(c) 本人同意此建議。

(d) 本人同意作出規定。

(e) 本人對此沒有異議，宜獲得法律界及政治界的一般認同。

(f) 本人同意此建議。

(g) 本人同意此建議。

(h) 本人對此沒有異議，宜獲得政治界及公眾的一般認同。

(i) 本人對此沒有異議，宜獲得政治界及公眾的一般認同。

（編者註：來信人要求以不具名方式公開。）

Subject: Consultation Paper on Disqualification of Candidates with Unserved Prison Sentences and other Related Matters.

Response by Tai Po District Councillor Dr. Yau Wing Kwong JP

Date: 18 August, 2014

The Consultative Paper addressed one key issue: there is no relevant specific provision under the existing electoral laws suspending disqualification from candidature or office pending an appeal (pg. 9). Following the close reading and examination of the Consultative Paper and public opinion, I have come to a conclusion that those who are currently released on bail pending appeal should immediately be disqualified from being nominated as a candidate at a LegCo election.

In chapter three, the government proposed two points and I disagree with the former (3.10a) but agree with the latter (3.10b). 3.10a discusses that an appellant who is released on bail pending appeal, regardless of the court of appeal of conviction, be allowed to be nominated as a candidate at a LegCo election. I do not agree with this proposal because of the following two reasons. Firstly, the administration failed to recognise the potential candidate- despite released on bail pending appeal- is found guilty by lower courts and the decision of the judge or jury is simply placed on hold rather than overruled. In other words, the potential candidate is in effect found guilty and for the time being requesting a second judgement by the courts. Unless the person is found not guilty and previous rulings overturned by the court of appeal before the LegCo nomination period, the person should not participate in the election and subsequently disqualified.

Secondly, as discussed in chapter two of the Consultative Paper (2.04), the LegCo must maintain public confidence, ensure proper operation and maintain public confidence in the electoral process. I believe that anyone who is charged by the Prosecution Service and pending appeal at the courts should not be able to be nominated for LegCo election. It is widely accepted that the general public wants and expects LegCo members to have a decent moral standard. For a person who is charged, found guilty by the lower courts (even if the person has appealed and awaiting the decision from the Court of Appeal or Conviction), this calls into question of the person's judgement and conduct thus should not be able to stand for public office.

To summarise, the government should legislate and stop any candidates who are pending appeal to stand for election. To be charged and stand trial at the courts show the candidate has serious contempt of the law and calls their character into judgement. I believe such act of the government will invite huge public support and increase public confidence in legislative processes.

[SoCO HKHRC] 未服監禁刑罰人士喪失成為候選人的資格及其他相關事宜公眾諮詢

to:
disqualification_consultation@cmab.gov.hk
20/08/2014 17:36
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To: "disqualification_consultation@cmab.gov.hk" <disqualification_consultation@cmab.gov.hk>,
Please respond to SoCO 香港社區組織協會

2 Attachments

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政制及內地事務局:

謹附上本會就未服監禁刑罰人士喪失成為候選人的資格及其他相關事宜公眾諮詢 提交意見書，以供參考.

香港社區組織協會
香港人權聯委會 謹啟

（編者註：此電郵的兩個附件內容相同，不重複刊載。）

香港社區組織協會　香港人權聯委會
就未服監禁刑罰人士喪失成為候選人的資格及其他相關事宜公眾諮詢 提交意見書

1. 特區政府本年七月發表《未服監禁刑罰人士喪失成為候選人的資格及其他相關事宜諮詢文件》(《諮詢文件》)，以收集公眾對改革未服監禁刑罰人士成為候選人資格的意見。**我們歡迎有關諮詢，並希望藉此促使當局修改法例，以符合《基本法》及《香港人權法案》有關選舉權利的條文規定。**

2. 當局是次進行的公眾諮詢，源於兩宗原訟法庭案件(*黃軒瑋及梁國雄 訴 律政司司長*，案件編號 HCAL 51/2012 及 HCAL 54/2012)。雖然原訟法庭並沒有就《立法會條例》第 39(1)(d)條的合憲性作出裁決，但在判詞中清楚列明現行規定抵觸《基本法》第 26 條和第 39 條，以及《香港人權法案》第 21 條。我們認為，當局及公眾在探討就獲提名為候選人及當選為議員的權利施加限制的規定上，除了考慮有關規定能否「維持公眾對立法會的信心」、「確保立法會順利運作」以及「維持公眾對選舉制度的信心」外，**必須同時考慮如何保障上述《基本法》及《香港人權法案》有關保障香港永久性居民依法享有的選舉權和被選舉權的規定**，以避免損害以上憲制權利，導致日後面對法律挑戰。

3. 我們認同，在考慮到以上因素情況下，任何正因服刑而受監禁人士喪失在立法會或區議員選舉中獲提名為候選人或當選為議員資格的規定在原則上有其合理性；然而，**我們認為獲准保釋等候上訴的人士，不論上訴案件來自任何等級法庭，或上訴至任何等級的法庭，只要法庭仍然准許該人士保釋，均可繼續獲提名為候選人或當選為議員**，因為准許該人士保釋，反映法庭認為上訴獲判得直的可能性等因素。因此，該人士應有權作候選人或當選人。

4. 另方面，任何正服刑**而受監禁**的等候上訴人士，並不應喪失在立法會或區議會選舉中獲提名為候選人或當選為議員的資格。這是由於監禁是向被定罪人士的一種懲罰，法庭判處有關人士監禁且不准保釋時，除了考量上訴人是否有較高成功上訴機會(strong likelihood of success)外，**同時亦會考慮在上訴案件獲得處理前，會極有可能已完成全部或絕大部份時間的刑期(likelihood that all or a substantial part of the sentence will be served before the disposal of the appeal)**。[1]由於上訴長短期間涉及很多外在因素，包括：法庭能否安排期間審理案件，若上訴人因法庭可獲較快時間處理案件，不會因上訴期間已完成全部或絕大部份時間的刑期，因此不獲准保釋而受監禁，導致喪失作為候選人或當選人的憲制權利，便顯得極不合理。這點特別是對於被判刑期長的犯人尤其不公，因為他們極不可能在上訴期間已完成全部或絕大部份時間的刑期，因此較不容易獲准保釋而受監禁，導致他們喪失成為候選人或當選為議員的權利。

5. 因此，縱使在落實有關權利上有不少實際困難(例如:難以報名參選、不能經常接受探訪、以至當選人難以參與議會會議或投票等)，當局應著手理順各項執行上的安排，而非剝奪正服刑**而受監禁**的上訴人士參選或當選為議員的權利。

6. 如同以上分析，**任何被羈留在勞教中心、教導所、戒毒所、更生中心或懲教署的精神病治療中心的人士，情況如同監禁的上訴人士，均應同樣享有獲提名為候選人或當選為議員的權利。**

7. 與此同時，我們認同，**根據「監管下釋放」的被定罪人士，只要遵守監管制度下的所有條件、沒有被召回監獄或相關的懲治機構，以及根據《長期監禁刑罰覆核條例》，獲准有條件釋放令在監管下獲釋的人士，均應容許其在立法會或區議會選舉中提名為候選人及當選為議員。**

8. 另外，我們認為以上各項建議均適用於立法會、區議會、鄉郊代表以至行政長官等各級選舉。

二零一四年八月

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[1] 請參閱刑事訴訟程序條例(第 221 章)第 83Z 條 和 香港特區訴 *Mohomed Rahoof Mohomed Sajahan* (案件編號 HCMA 270/2014)。

HONG KONG BAR ASSOCIATION

5th September 2014

Miss Helen Chung
for Secretary for Constitutional and Mainland Affairs
Constitutional and Mainland Affairs Bureau
12/F, East Wing, Central Government Offices
2 Tim Mei Avenue, Tamar.
Hong Kong.

Dear Miss Chung,

Public Consultation on
Disqualification of Candidates with
Unserved Prison Sentences and other Related Matters

I refer to your letter of 21st July 2014.

Please find a copy of the Submission of the Hong Kong Bar Association dated 5th September 2014 for the consideration of the Constitutional and Mainland Affairs Bureau. The same has been endorsed at the Bar Council Meeting held on 4th September 2014.

Yours sincerely,

(Signed)

Paul T.K. Lam SC
Vice Chairman

Consultation Paper on Disqualification of Candidates with Unserved Prison Sentences and other Related Matters

Submission of the Hong Kong Bar Association

1. The HKSAR Government publishes the Consultation Paper on Disqualification of Candidates with Unserved Prison Sentences and other Related Matters ("the Consultation Paper") to consult the public on its recommendations following a review of the legislation on disqualification of Legislative Council candidates who have an unserved prison sentence either at the time of nomination or at the time of the election. The HKSAR Government undertook this review following the judgment of the Court of First Instance in Wong Hin Wai & Anor v Secretary for Justice (HCAL 51, 54/2012) (reported as [2012] 4 HKLRD 70), which declared section 39(1)(b)(i) of the Legislative Council Ordinance (Cap 542) to be inconsistent with Article 26 of the Basic Law and Article 21 of the Hong Kong Bill of Rights. Section 39(1)(b)(i) sought to disqualify a person from being nominated as a candidate at a Legislative Council election and from being elected as a member of the Legislative Council if the person has in Hong Kong or any other place been sentenced to imprisonment and has not served the sentence or undergone such other punishment as a competent authority may have been substituted for the sentence.

2. The Hong Kong Bar Association ("HKBA") submits its views on the Consultation Paper.

The Consultation Paper

3. The HKSAR Government indicates in para 1.07 of the Consultation Paper that at the time it announced the review, it was of the view 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", so that it considered that section

39(1)(b) was enacted to serve legitimate aims. Chapter 2 of the Consultation Paper sets out the HKSAR Government's considerations of the said objectives for imposing restrictions on the right to be nominated as a candidate and be elected as a member of the Legislative Council. On the basis of the considerations in Chapter 2, the HKSAR Government considers in Chapter 3 that: (a) there is sound justification for section 39(1)(d) of the Legislative Council Ordinance, which disqualifies a person from nomination or election if on the date of nomination or election, he is serving a term of imprisonment (para 3.03); (b) there may be a case to allow persons on bail pending appeal to stand for election, so long as he or she is not otherwise caught by other restrictions under section 39 (para 3.06) and a specific regime in the electoral laws to cater for this class of persons should be enacted (para 3.10); and (c) all escaped convicts should be disqualified from being nominated as a candidate or being elected in Legislative Council elections. Chapter 4, which concerns "Related Issues", discusses a range of issues, including the disqualification of persons serving other modes of custodial punishment or treatment, the disqualification of persons who have been released from prison custody under different routes, and the corresponding amendments to the electoral legislation regarding District Councils and Rural Representatives.

Section 39(1)(b), (d) and (e), Legislative Council Ordinance

4. The HKBA notes that section 39(1)(e)(i) of the Legislative Council Ordinance, which has never been questioned on constitutional grounds, disqualifies from nomination or election a person who is or has been 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 3 months without the option of a fine, where the election is to be held or is held within 5 years after the date of the person's conviction. Accordingly, the categories of persons that remain for section 39(1)(b) and (d) to cover include mainly persons who have an unserved prison sentence of 3 months or less at the time of the relevant election campaign or election; and persons who have been sentenced to life

imprisonment or a long term imprisonment a considerable time before the relevant election campaign or election and are still serving that term of imprisonment at the time of the relevant election campaign or election. The Court of First Instance recognized the former category of persons in *Wong Hin Wai* at para 84. The latter category of persons can be more suitably dealt with by a narrowly tailored and precise legislative provision.

5. The HKBA considers that the HKSAR Government's discussion in Chapter 2 of the Consultation Paper of the preferred objectives of maintaining public confidence in the Legislative Council, ensuring proper operation of the Legislative Council and maintaining public confidence in the electoral process has not been convincing. The HKSAR Government's discussion has not advanced any further than how they had been addressed by the HKSAR Government before the Court of First Instance in *Wong Hin Wai* at paras 85 to 96. The HKSAR Government's discussion also omits the historical examination undertaken before the Court of First Instance in *Wong Hin Wai* at paras 97 to 99 of the candidature disqualification provisions that had served Hong Kong without any difficulties or problems between 1985 and 1997 and the absence of any rational reason for the introduction of more restrictive candidature disqualification provisions in 1997 in the light of the progressive development of political maturity in Hong Kong since 1985. The failure on the part of the HKSAR Government to set out and address these matters, which had been the subject of rational debate and judicial comment in *Wong Hin Wai*, has not only undermined the veracity and reliability of the HKSAR Government's discussion of these preferred objectives, but also missed the opportunity of putting forward rational arguments to address the critical and convincing observations and comments of Lam J who, after analysis, rejected the HKSAR Government's case in justifying that section 39(1)(b) was a proportionate restriction of the constitutionally guaranteed fundamental right of HKSAR permanent residents to stand in elections.

6. The Consultation Paper also lacks any study and information of how jurisdictions outside Hong Kong have addressed the same issue of restricting the candidature of citizens in elections where the citizen has an unserved prison or like custodial sentence.

7. The HKBA is of the view that in so far as the HKSAR Government seeks to maintain that section 39(1)(b)(i) of the Legislative Council Ordinance, in the general and wide terms that the Court of First Instance had rejected in *Wong Hin Wai*, is a justified restriction of the constitutionally guaranteed fundamental right of HKSAR permanent residents to stand in elections (with the exception of persons on bail pending appeal), it has failed to do so in the Consultation Paper.

8. The HKBA is also of the view that the HKSAR Government has failed to justify section 39(1)(d) of the Legislative Council Ordinance as a proportionate restriction of the constitutionally guaranteed fundamental right of HKSAR permanent residents to stand in elections. It is clear that section 39(1)(d) applies irrespective of the length of the unserved term of imprisonment; it will apply to disqualify so long as the person concerned remains in prison custody on the relevant day. Indeed Lam J saw the force of this argument at paras 109, 110 in *Wong Hin Wai*. However, Lam J suggested further research on the consequential matter of meaningful access to run the election campaign at paras 110, 111. The Consultation Paper does not contain any such research; it merely refers to the suggestions of the Court of First Instance in footnote 11. It is also clear that many of the comments and observations of the Court of First Instance in respect of section 39(1)(b) in *Wong Hin Wai* also apply to section 39(1)(d), including the historical examination of the Legislative Council electoral laws described above.

9. One observation of Lam J in *Wong Hin Wai* deserves special mention. The Judge agreed in para 86 that "in the present day Hong Kong situation it is unlikely that a conviction and liability to serve prison sentence of a

candidate of LegCo election is not revealed to the voters even if he or she is on bail pending appeal. There would not be any confusion. I have no doubt that the voters in Hong Kong are intelligent enough to take into account the potential contingency of imprisonment of such candidate in deciding whether to cast their votes in favour of him or her". The HKBA is of the view that this observation applies with equal force to impugn both section 39(1)(b) and section 39(1)(d) of the Legislative Council Ordinance.

10. From the discussion in the preceding paragraphs, the HKBA has come to the view that the HKSAR Government should conduct, as a matter of priority, a review of all the disqualification provisions in section 39(1) of the Legislative Council Ordinance in respect of persons who have been convicted of a criminal offence and persons who have an unserved sentence of imprisonment. This review should span at least section 39(1)(b), (d) and (e) with a view to reformulate the provisions. Apart from the constitutional difficulties with section 39(1)(b)(i) and section 39(1)(d) that have been identified above, the HKBA considers that section 39(1)(e)(i) does not sit well with the opening words of the paragraph (e), which limits the application of sub-paragraph (i) to where an election is to be held or is held within 5 years after the date of the person's conviction. The HKSAR Government can consider whether the language of section 39(1)(e)(i), unshackled from the said opening words, can be a worthy substitute for section 39(1)(b).

Specific electoral law regime for persons on bail pending appeal

11. In the light of the views of the HKBA on the unconstitutionality of section 39(1)(b) and (d) and on section 39(1)(e)(i) of the Legislative Council Ordinance above, it is suggested that the HKSAR Government ought to allocate priority to the overall reformulation of the disqualification provisions in section 39(1) in respect of persons who have been convicted of a criminal offence and persons who have an unserved sentence of imprisonment. The specific proposal on the part of the HKSAR

Government to introduce electoral legislation governing persons on bail pending appeal should be examined as part of the reformulated provisions and not in isolation and in a piecemeal manner.

Escaped convicts

12. The HKBA also, for similar reasons, considers that the specific proposal on the part of the HKSAR Government to introduce electoral legislation to disqualify escaped convicts should be examined as part of the reformulated provisions in section 39(1) of the Legislative Council Ordinance and not in isolation and in a piecemeal manner. Nevertheless, in this connection, the HKBA endorses the view of Lam J in *Wong Hin Wai* at para 95 that "it is actually difficult to envisage an escaped convict standing for election, at least not one who is being convicted by a court in Hong Kong or a jurisdiction with which we have extradition arrangement".

Persons detained in Detention Centres, Training Centres, Drug Addiction Treatment Centres, Rehabilitation Centres or a CSD Psychiatric Centre

13. The HKSAR Government suggests that there may be a need to clarify the electoral law in respect of disqualification of candidature in relation to persons detained in correctional institutions other than prisons. The HKBA notes that the usual period of detention, training or treatment in these correctional institutions exceeds 3 months, with the exception of a CSD Psychiatric Centre, which may be for a duration shorter than or of 3 months. Thus in most cases, a textual modification of section 39(1)(e)(i) of the Legislative Council Ordinance would be a sufficient means to address the matter. And a person who is required to be treated in a CSD Psychiatric Centre may also be a person who is incapable by reason of mental incapacity of managing and administering his or her property and affairs and thus disqualified by virtue of section 39(1)(2) or (3).

Release under supervision and conditional release

14. The HKBA is of the view that the HKSAR Government's proposal to enable persons who has been released under supervision to stand in Legislative Council elections to be one that ought to be encouraged. On the other hand, as stated above, this proposal should be examined as part of the reformulated provisions in section 39(1) of the Legislative Council Ordinance and not in isolation and in a piecemeal manner.

Leave of absence

15. The HKBA considers that prisoners who are on a leave of absence from imprisonment pursuant to the exercise of the discretionary power of the Commissioner of Correctional Services should be disqualified from candidature in Legislative Council elections.

Corresponding changes to District Councils Ordinance and Rural Representative Election Ordinance

16. The HKBA is of the general view that while there should be a reformulation of the relevant provisions of the District Councils Ordinance (Cap 547) and the Rural Representative Election Ordinance (Cap 576) concerning disqualification of persons from candidature due to his or her conviction of certain criminal offences or having an unserved prison sentence, the corresponding exercise ought to take account of the functions and duties of these electoral institutions and their more intimate connections with the community, so that greater participation from willing members of the public should be enabled and encouraged. Viewed from this perspective, it may be justified to put in place more relaxed disqualification provisions for these electoral institutions than for the Legislative Council.

Period of disqualification of former District Council member

17. The HKBA is of the view that this matter can be addressed as a miscellaneous amendment to electoral legislation to be inserted as part of a composite Bill that may be introduced from time to time to make a

basket of changes to electoral legislation. It needs not be tied up with the reformulation of disqualification provisions of persons from candidature due to his or her conviction of certain criminal offences or having an unserved prison sentence that the HKBA has suggested in the preceding paragraphs of this Submission.

Dated 5th September 2014.

HONG KONG BAR ASSOCIATION

Disqualification Consultation

to:
cmabenq@cmab.gov.hk, disqualification_consultation@cmab.gov.hk
16/09/2014 10:09
Hide Details
From:
To: <cmabenq@cmab.gov.hk>, <disqualification_consultation@cmab.gov.hk>,

To: Secretary for Constitutional and Mainland Affairs Bureau

- through email Portal**:** disqualification_consultation@cmab.gov.hk

- on the subject:

-

Disposition of Consultation Paper on – Disqualification of Candidates with Unserved Prison Sentences and other Related Matters

-

Sir,

In briefing myself, I, with the name and email address as attached, am a former government servant in one of the disciplinary services, and am making a Disposition responding to the Consultation as captioned.

It should be noticeable that the scope of Consultation as per the captioned subject has initially covered a much wider range relating the Disqualification of Candidates with Unserved Prison Sentences.

However, more focused attention should be placed on such case which has already caused tremendous problematic procrastinations of legal involvements, raising accrual concerns. and requiring eventual rectification for justice.

-

Preface

To be considered specifically is the case to be mentioned here in which the Challenge of Constitutionality has been mounted by "Applicant in HCAL 54 of 2012" for review against the disqualification provisions under Sections 39(1)(b)(i) and 39(1)(d) of the LegCo Ordinance.

This submission of this disposition is primarily intended in bringing forward some resourceful reference

for the purpose of attaining eventual rectification for justice of this case.

To be noted, starting a formal **Appeal** in this case should be more appropriate before taking subsequent L**egal Procedures** in the pursuit of eventual Vindication for Justice.

It is evident in the review ruling according to the Court of First Instance, the Adjudicator at the onset has basically adopted the same line of approach as implicit of the forwarded Declaration.

With Section 39(1)(d)being excluded with backing, consideration of the Appeal should be focusing on -the Adjudicator's Ruling on Section 39(1)(b)(i) of the LegCo Ord Cap 542 being **Inconsistent** with some cited Articles of the Basic Law together with some other References respectively from the Hong Kong Bill of Rights and from the International Covenant on Civil and Political Rights, and are therefore **Unconstitutional**.

-

Adjudicator's line of approach conforming to the Declaration leading to the Decision on 14 June 2012, and Reasons of Decision afterwards on 21 June 2012

In the Review Ruling, basically the line of approach has remained to be conforming to that of the Declaration.

There are elaborations which only serve the purpose of enhancing the onset approach in considering the LegCo Ord for Section 39(1)(b)(i) but with Section 39(1)(d) excluded with due backing.

Then there has come the Decision of ruling on 14 June 2012 , followed afterwards by the Reasons for Decision on 21 June 2012 – with a simple conclusion stating that the Declaration regarding Section 39(1)(b)(i) being granted.

The Forwarded Declaration –

" A declaration that sections 39(1)(b)(i) and 39(1)(d) of LCO are inconsistent with Articles 25, 26, 28 and 39 of the Basic Law of Hong Kong Special Administrative Region and/or Articles 5(1), 5(4) and 21 of section 8 of the Hong Kong Bill of Rights Ordinance Cap 383 and/or Articles 9(1), 9(4) and 25 of the International Covenant on Civil and Political Rights 1966, and are unconstitutional."

Obscuring Nature in the Adjudicator's Line of Approach leading to the Unacceptable Affirmation in the Ruling critically short of substantiated parsing –

As in the outline above, it has been pointed out that essentially the weakness of the mentioned Court Ruling lies in the absence of substantiated parsing where it is critically necessary.

However, the processing of the ruling is so unacceptable, initially in that from the **Quoting** of the Declaration to the **Granting** of the same, there is an empty void being short of the parsing in validating the Proof of Contradiction by Inconsistence.

However, on the Adjudicator's side, from quoting of the Declaration to granting of the same, there is an empty void being short of the parsing in validating the Proof of Contradiction by Inconsistence, which is not in compliance with demanding Topological Requirements.

Elusiveness and Limitations pertaining to the Rudimentary attempt of the Adjudicator in the adoption of Proof by Contradiction –

As implicit in the line of approach, the Adjudicator has already in effect, attempted the adoption of Proof by Contradiction, but there are still limitations to be considered.

On the Applicant's side, evidently as in the Declaration, there is the initial intent of establishing Contradiction by Inconsistence, based on references of limited numbers.

However, on the Adjudicator's side, from quoting of the Declaration to granting of the same, there is an empty void being short of the parsing in validating the Proof of Contradiction by Inconsistence, and in pursuance accordingly for subsequent fairness.

Elaboration pertaining initially to the Validity of Proof of Contradiction by Inconsistence

Admissible Proof of Contradiction by Inconsistence in the Axiomatic Approach –

For the application in Scientific Thesis, the Axiomatic Approach used for the proof of Contradiction by Inconsistence is admissible only under the Topological Structure with strict definition of the component axioms in the axiomatic domain.

In such Axiomatic Approach, all axioms are **Independently** defined, such that any component of an iterated statement under scrutiny is testified to be **Inconsistent** with any of the defining Axioms, then the whole

iteration of statement can be regarded as **Contradicting** the defining truth.

The criterion of such proof in this case requires all axioms to be independently defined, failure in observing this criterion will lead to failure of this proof.

Proof of Contradiction by Inconsistence when applied to the Construct of the Basic Law being Paradoxical –

As the Basic Law has a One-Integral Anatomy in its Structural Construct, all the Articles being connected together through links of related relevance. to each other with respect to **not Independent** from each other.

The attempt of allowing limited selection of Articles in establishing Inconsistence is already **Severally** Quoting component references in a **Jointly** connected piece of the Basic Law, leading to erroneous implications **against the Principles of Impartiality** in upholding Fairness and Justice.

The necessity of probing further in the Adjudicator's line of approach conforming to the mentioned Declaration

As pointed out the processing of the ruling is so unacceptable, initially in that from the **Quoting** of the Declaration to the **Granting** of the same, there is an empty void being short of the parsing in validating the Proof of Contradiction by Inconsistence.

As above, the initial probing reveals the implications pertaining to the elusiveness in the considerations in accordance to the Principles of Impartiality.

However extensive elusiveness can lead to illusiveness as well, in which case involvements have to be considered in connection both with the Principles of Impartiality as well as Accountability.

Objective Considerations of Back-flexing Approach–

In the wake that the conceitedness implicit in the Review is so enormous, the corresponding flexing is demanding in the Pursuit in revealing both the **Elusiveness and Illusiveness** by deciphering according to the **Indispensible Principles of Impartiality and Accountability** in order to procure the Eventual Vindication for Justice, and in clearing of all the Procrastinations due to such deceptive ruling.

To this end of the above pursuit, Data-collections and Elaborations are presented in Modules of various topics which can be further expanded where necessary.

References Review Case of Court of First Instance

LegCo Ord under Review –

Section 39(1)(b)(i) of LegCo Ord Cap542

Quoted References on Applicant Side –

Articles 25,26,28 and 39 of the Basic Law of Hong Kong

Articles 5(1), 5(4) and 21 of section 8 of the Hong Kong Bills of Rights Ordinance Cap383

Articles 9(1), 9(4) and 25 of the International Covenant on Civil and Political Rights 1966

Proposed Basic References on Appealing Side –

Article 25 of the Basic Law – all Residents are equal

Article 42 of the Basic Law – Obligations to abide by the Law

Important Events in Chronological Order

Conviction of a 2 months sentence for Criminal Damage and Breaking Public Order

sentenced on – **20 Mar 2012**

Granted bail pending appeal of Criminal Offences – **at a later date**

Decision of Ruling on LegCo Ord Review by Court of First Instance – **14 June 2012**

Reasons for Decision of Ruling on LegCo Ord Review by Court of First Instance – **21 June 2012**

Commuted to 4 weeks of imprisonment upon ruling of appeal for Criminal Offences – **June 2014**

Government decision not to appeal against the judgment – **12 July 2012**

Nomination of Election – **18 to 31, July 2012**

Sworn in of LegCo Members – **10 Oct 2012**

Consultation on disqualification – **21 July to 30 Sept, 2014**

Outline Modules on Topics of Back-flexing

As the objectives of Back-flexing are clear, only Data-collections and Flexing-points to note are necessary and presented in various Outline Modules.

One-Integral Law Anatomy of the Basic Law

The One-Integral Law Anatomy of the Basic Law should be duly honoured in that the severally quoting of certain items of Articles cannot be limiting the significance other items of Articles in the Basic Law.

Important Links through Verbal Terminology

Through verbal links with important **pivotal** meaning, quoted references by both parties whether of the Applicant Side or the Appealing Side can be gathered and caused to be **leveraged** for fairness by the Adjudicator.

Important Link in connection with the word Resident –

This has appeared initially in the quoted references of the Applicant Side as in -

Articles 25,26,28 and 39 of the Basic Law of Hong Kong

and should be probed into response as in the quoted reference of the Appealing Side as in -

Articles 25 and 42 of the Basic Law of Hong Kong

Some points to Note –

In fact Article 25 is about being equal

Articles 25, 26, 28 and 39 are about the Rights and

Articles 25 and 42 about the Bindings

So , it can be considered as Articles 25, 26, 28 and 39 vs Articles 25 and 42

To be Remarked –

Articles 25, 26, 28 and 39 are brought forward by the Applicant Side for considerations of Rights,

However, Articles 25and 42 are not being brought into consideration by the Adjudicator for considerations of Bindings.

So the coming about of Articles 25 and 40 depends on the initial probing in the challenge against the

Adjudicator of being **inadequate** in the pursuance of the **Principles of Impartiality** in the admissibility the proof by contradiction and its significance granting Unconstitutionality based on **severally** quoted

references.

Having cleared such hurdle as above, Articles 25 and 40 can be properly quoted for counter-flexing leveraging

Some points to be noted further with relevant Links–

In the upcoming position as Article 25 is being quoted separately by both Applicant and Appealing sides, it is the leveraging of **Rights vs Liabilities** pertaining to the term of **Residents** as link.

The apparent glitch is unlawful restrictions over rights.

Also according to Article 39, there is the apparent glitch in of the necessary distinction between **Prescribed Restriction vs Ruled Bindings.**

However such glitches should be cleared as pertaining to the initial Ruling of the Criminal Case on the date **20 Mar 2012 per**.

Evidently such Court Ruling is Lawful Binding, and also such Bindings of Court Ruling is based on Revealed Findings.

Therefore the glitches as above are not substantial.

It is also factual that the Adjudicator of the Review has not caused any intervention in the challenge against the Court Ruling of the initial Criminal Offence.

<u>Some details to be cosidered in the appeal against the Ruling on Review of the concerned Legco Ord Section 39(1)(b)(i) of LegCo Ord Cap542</u>

As the appeal is a process mainly in Vindicating the concerned LegCo Ord.

However, at the same time, it can lead also to the rectification of the procrastination involvements of inappropriately seating the Applicant to the Legislative Council.

To this end with Objectives as above, it is necessary to point out that the Adjudicator has effectively made **Two Inadmissible Faults** in the Review Ruling in:

- in granting the Declaration claiming Unconstitutionality of the LegCo Ord based on severally quoting items of Articles in the Basic Law, as well as ignoring the Topological limitations of Proof of Contradiction, **giving biased ruling on the Review case** against the concerned LegCo Ord,

- in ignoring the Binding Liabilities of the Applicant while in the status of a criminal still implicitly bearing the uncertainties pending appeal, where it should be noted it is the onus of the appellant to clear the uncertainties, while the Adjudicator having no reference to the onus of the Appellant in the initial Criminal offences, and by means of the biased Review ruling as mentioned above, the Adjudicator is in effect, **giving an undue advantage to the Applicant in a justified position by Court-ruling** in the apparent pre-enactment phase in procuring LegCo Office**,** which only has resulted in the further procrastination involvements in the seating of Applicant in the Legislative Council.

Actually, the Adjudicator has not committed to the processing of any functional enactment for the desired seating of the Applicant in the Legislative Council.

However, such an admissible ruling of the Adjudicator is giving undue advantage by Court-ruling which has turned out to be so conceited and inadmissible.

Preparation and Processing of the Appeal against theRuling Review

The actual processing of the appeal can be based on refining the references above.

However, by formalities, there is still the need of New Evidence in processing the **Timely Appeal** at present.

Such selection can be made from among the enlisted Important Events in Chronological Order as above.

However, the event of the Applicant having served on **June 2014,** a commuted sentence for the Criminal Offence is preferable, as there is no procreation concern whether the Applicant has been serving he commuted sentence or not.

The actual concern lies in the fact that the Applicant has been serving and thus clearing the Liabilities in a period in **June 2014**, whereas the Decision of Ruling on LegCo Ord Review by Court of First Instance is on **14 June 2012 -**

which means that there has been a period **from 14 June 2012 to June 2014** that the Applicant has not cleared the Liabilities while pending appeal, whereas the in ignoring this fact, and by means and by means of the biased Review ruling as mentioned above, the Adjudicator is in effect, **giving an undue advantage to the Applicant in a justified position by Court-ruling** in the apparent pre-enactment phase in procuring LegCo Office.

at a datea sentence

Commuted to 4 weeks of imprisonment upon ruling of appeal for Criminal Offences – **June 2014**

The rectification of procrastination of seating the Applicant in the LegCo

It is appropriate time to settle should the appeal be having favourable results

Through proper proceedings,

the concerned Section 39(1)(b)(i) of LegCo Ord Cap542 could be reinstated

and with retrospective pursuance to the date before the Sworn-in of LegCo Office of the Applicant's being worn in of LegCo Members – **10 Oct 2012,**

the concerned Applicant should be **Disqualified from office accordingly.**

Disclaimer

By effect of the statement made here, I have no objection that my disposition made here be cited in its entirety or otherwise, as anonymous submission, keeping my identity confidential within the records of the government setting.

Sincerely with Regards,

From:

(Signed)

(Editor's Note : The sender requested anonymity.)

Comment on Consultation on Disqualification of Candidates with Unserved Prison Sentences and other Related Matters

I'm writing as an employer who has hired a handful of rehabilitated offenders. A Christian myself, I support all rehabilitees joining us again in the society, as at the end of the day, Lord gives us mercy for what we did wrong. I hope everyone's willing to give rehabilitees a chance to stand up again.

I see quite a big difference of supporting those who haven't finished their punishment yet for the issue of standing for elections, though. I expect members of legislative council to be persons of good virtue. I think staying at prisons of whatsoever kind is a learning process for the lads to correct and change which makes me feel quite sensible to ban all of them from elections when they are still in jail.

My experience says lads out of jail would still have officers to come and visit them for chats so-and-so (and I suppose they are what referred as early release supervision). What I don't understand is I see there're different catergories of supervision from your paper with different treatments towards the issue of standing elections. While my heart says yes and I feel my lads and believe all others coming out from jail could be all good fellas, my heart says no to those who still need supervision to stand for elections. If they are still to be checked by officers, they are still in learning process to join the society. Wouldn't standing for elections too bothersome if not burdensome to stand in the way of learning? If they are still to be checked by officers, certainly they have to obey some sorts of rules that may make them not fully of good virtue yet. The thing is, if I understood the paper right, we are not talking about banning them from elections for life. We are not depriving of their right to never be a member again. I find myself confused about where comes the urgency for elections while all of them should first stay focus, behave themselves and complete the entire process, be it in prison or after early release, before thinking about elections and serving the society. I just don't get it when your paper seems to suggest the otherwise.

Credits for the lads who have worked for me though.

Peace and joy,
Darren E. Cresswell

Constitutional and
Mainland Affairs Bureau
12/F, East Wing
Central Government
Offices
Tamar
Hong Kong

Hong Kong Citizens for Free Elections

23 September 2014

Response to:
'Consultation of Disqualification of Candidates with Unserved Prison Sentences and other Related Matters'

1. We disagree with all of the suggestions in the consultation paper. We believe that none of the categories of persons mentioned in the consultation paper should be disqualified from being nominated, elected or serving as LegCo members.

2. Suffrage is the core of citizenship and the social contract. It is what binds us to the polity: it is a right not a mere privilege. It cannot and should not be taken away.

3. Whatever someone's current or past criminal history, they are still members of society entitled to democratic rights - including the right to stand for office.

4. Hong Kong people should have the right to elect whoever they believe will best represent them - regardless of candidates' criminal histories. The citizens of our democracy, acting together through elections, are the only group that has the right to take a candidate's criminal convictions into account. This is fundamental to our human rights

that are protected by the Basic Law and the Hong Kong Bill of Rights.

5. Many great politicians and public servants have had criminal records:

a. Mohandas K. Gandhi
b. Nelson Mandela
c. Martin Luther King Jr.
d. Kwame Nkrumah
e. Aung San Suu Kyi
f. Patrice Lumumba
g. Benigno Aquino Jr.
h. Mohamed Nasheed
i. Xanana Gusmao
j. John Lewis
k. Malcolm X
l. Sylvia Pankhurst
m. John Maclean
n. Rosa Luxemburg
o. Stephen Biko
p. Eugene Debs
q. Bobby Sands
r. John Cooke
s. Thomas Paine
t. Joe Slovo

6. Furthermore, Hong Kong has far too many criminal offences on the statute books, and not all "offences" are the same. Practically every ordinance provides for some sort of criminal offence - many of which are petty in nature and unfit to be described as "criminal offences". It would be far too easy for people to be disqualified from standing for election for trivial matters.

7. Allowing qualification for public office to be dependent upon a clear record has, in many jurisdictions, been used as a screen to keep the poor and other minorities from participating equally in government. Many of the figures

identified above were prosecuted specifically to prevent the people from choosing their representatives. Such a bar is all the more offensive given Hong Kong's legacy of colonial laws, enacted without the free input of Hong Kong people. As Martin Luther King Jr. wrote in his letter from the Birmingham jail:

> *An unjust law is a code inflicted upon a minority which that minority had no part in enacting or creating because it did not have the unhampered right to vote. Who can say that the legislature of Alabama which set up the segregation laws was democratically elected? Throughout the state of Alabama all types of conniving methods are used to prevent Negroes from becoming registered voters, and there are some counties without a single Negro registered to vote, despite the fact that the Negroes constitute a majority of the population. Can any law set up in such a state be considered democratically structured?*

8. The proposals before us are fundamentally defective because they propose to restrict our democratic rights before we have even begun to enjoy them.

9. There is simply no need for the restrictions proposed. For these reasons, we urge the CMAB to remove any disqualification for LegCo membership based on criminal history. All Permanent Residents should be able to be nominated and elected. There should be no restrictions.

Hong Kong Citizens for Free Elections

就《未服監禁刑罰人士喪失成為候選人的資格及其他相關事宜公眾諮詢》提交意見書

to:
disqualification_consultation@cmab.gov.hk
24/09/2014 17:03
Hide Details
From: 位醒 楊
To: "disqualification_consultation@cmab.gov.hk" <disqualification_consultation@cmab.gov.hk>,
Please respond to 位醒 楊

2 Attachments

楊位醒東區區議員電郵面頁- 致政制及內地事務局局長(鍾志清).doc

《未服監禁刑罰人士喪失成為候選人的資格 及其他相關事宜公眾諮詢》意見書.doc

鍾先生,

附上有關意見書,請查收。
謝謝!

東區區議員
楊位醒
(助理Tracy代行)
24.9.2014

東區區議員楊位醒

電郵面頁

主題	就《未服監禁刑罰人士喪失成為候選人的資格及其他相關事宜公眾諮詢》提交意見書
日期：	24/9/2014　　連此頁共 3 頁

收件者：	政制及內地事務局 局長 鍾志清先生
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如發現缺頁或內容不清，請即與本人聯系

發件者：	楊位醒
傳真：	電話：　(楊小姐)
電郵：	

☐急件　☑ 請檢閱　☐請加註　☐請回覆

備註： 就《未服監禁刑罰人士喪失成為候選人的資格 及其他相關事宜公眾諮詢》提交意見書. 敬請查收. 謝謝!

東區區議員楊位醒

《未服監禁刑罰人士喪失成為候選人的資格及其他相關事宜公眾諮詢》意見書

一向以來，立法會選舉均依照由立法會制訂的相關選舉法例舉行。《立法會條例》（第542章）第39(1)(b)條規定被判監禁而未服刑人士喪失獲提名為立法會選舉候選人及當選為議員的資格的條文，已存在多年。大部分港人亦不會容忍「帶罪之身」及有案底紀錄的人擔任立法會議員，可荒謬的是具有案底紀錄的人竟然成功當選，在議會上無所作為，只是拉布破壞建樹欠奉。正正是這位短期坐監議員當日成功引用其他法例以子之矛，攻子之盾 ，令政府打輸官司，如今還要設法檢討諮詢去堵塞漏洞。

立法會條例禁止被判監但未服刑人士參選的條文，是在二○一二年六月被高等法院裁定違憲。法官指出，立法會條例》第39（1）（b）條與《基本法》第26條及39條及《香港人權法案》第21條有抵觸。因此，政府承諾會就未服監禁刑罰人士參加立法會選舉的資格進行檢討，在適當時候就此及其他相關事宜諮詢公眾，及如有需要，建議對相關的選舉法例作出適當修訂。

由於同一條例之下有條文禁止被判監超過三個月或就所訂明罪行被裁定罪名成立人士參選立法會，因此要考慮修訂的

條文，只是限制被判監不多於三個月人士。

在諮詢文件中，政府初步建議就獲准保釋等候上訴的人士而言，不論上訴案件來自任何等級的法庭，亦不論上訴至任何等級的法庭，只要該人士仍然獲准保釋，並且沒有受到《立法會條例》第39條的其他規定所限制，則容許該人士在立法會選舉中獲提名為候選人及當選為立法會議員，直至上訴獲得處置為止。本人認為亦合情理，候選人一旦上訴失敗判刑，勿論其坐監是否少於三個月，選民自會運用智慧決定是否投其一票，把他送進議會。

另一方面，政府建議不論逃犯是否正等候上訴判決，均喪失在立法會選舉中獲提名為候選人及當選為立法會議員的資格。本人認為，這是絕對無可爭議的事，相信做了逃犯也沒有時間也沒有興趣想去議事堂論政。

如果《立法會條例》的相關條文經公開諮詢後，政府決定作出修訂，《區議會條例》（第 547 章）及《鄉郊代表選舉條例》（第 576 章）關於喪失獲提名為候選人及當選資格的條文，應該也一併作出修訂。

東區區議員
楊位醒

2014 年 9 月 23 日

關於「未服監禁刑罰人士喪失成為候選人的資格及其他相關事宜」的意見

to:
disqualification_consultation@cmab.gov.hk
25/09/2014 11:08
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From:
To: "disqualification_consultation@cmab.gov.hk"
<disqualification_consultation@cmab.gov.hk>,

先生／小姐：

誠如原訟法庭的判決，「指出《立法會條例》第39(1)(b)條與《基本法》第二十六條及三十九條及《香港人權法案》第21條有抵觸」，對關於獲得提名的權利及當選權的限制，只有宜鬆不宜緊，否則只會帶多更多關於該等限制的訴訟。

另外，公眾對立法會的信心不必由政府多在選舉中施加限制，如對該名候選人沒有信心，選民也不會投該人一票，政府無須多此一舉。

立法會亦有機制罷免須服刑的立法會議員的議席，議會亦不會因此而運作不暢順。梁國雄議員較早前曾在任期當中服刑，而立法會亦因此有議員提出罷免梁議員的議席，只是議案被否決，但立法會並沒有因此而失效或運作不暢順的情況，可見現行機制是行之有效。

懲教署的口號「支持更新，共建安穩社群」，懲教署希望社會能夠接納更新人士，但　貴局卻推行政策以限制更新人士的權利，也許「局」能壓倒「署」，不過為何政府要推出自相矛盾的政策呢？是否不相信懲教署亦懲亦教的方針？也許只有　貴局才能知道。

總括而言，本人反對此諮詢文件內的建議，日後對參選、提名及當選權利的限制亦應放寬或至少維持現狀。最後，希望　貴組別能夠將正在諮詢的文件多加宣傳，令市民知道政府真正在聆聽公眾意見，避免令人有覺得政府是在鬼鬼祟祟作諮詢然後因沒有人提出反對而僥倖通過市民有機會反對的政策。謝謝！

市民鍾先生謹啟
25/09/2014
二零一二年六月二十一日，原訟法庭頒下書面判詞
2
，指出
《立法會條例》第
39(1)(b)
條與《基本法》第二十六條及
二零一二年六月二十一日，原訟法庭頒下書面判詞
2
，指出
《立法會條例》第
39(1)(b)
條與《基本法》第二十六條及

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未服監禁刑罰人士喪失成為候選人的資格公眾諮詢

to: disqualification_consultation@cmab.gov.hk

29/09/2014 08:52

From:

To: disqualification_consultation@cmab.gov.hk,

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我認為未服監禁刑罰人士喪失成為候選人的資格公眾諮詢必須解決以下問題：

(1) 一個犯法仍在坐監或監管下提早釋放的犯罪者去當議員立法，試問哪能合乎邏輯？

(2) 如一個監管下提早釋放的犯罪者可以參選，即可視為不會動搖「維持公眾對立法會的信心」，既然如此，何不連監管制度也取消，反正他連立法會都可以做？

(3) 要是「保釋等候上訴人士」獲保釋在外參選時再犯事，或當選後得知上訴失敗以致議席需重選，是否浪費公帑？是否政府負責？重選投票率往往較低，豈非更無代表性？

(4) 雖然文件並無以精神病為由而禁止監禁於精神病治療中心的人參選和做選員，只是既然這些人以被斷定為精神病患，根本難以勝任議員職務，雖則選民見其情況多不會投他們一票，也不清楚這樣做是否有歧視成分，但讓他們參選好像有點多此一舉，當中更有浪費公帑之嫌，何不大刀闊斧一律禁止？

經民聯回應《未服監禁刑罰人士喪失成為候選人的資格及其他相關事宜諮詢文件》

to:
disqualification_consultation@cmab.gov.hk
29/09/2014 16:50
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1 Attachment

經民聯回應「未服監禁刑罰人士喪失成為候選人資格公眾諮詢」的意見書.pdf

致：

政制及內地事務局

敬啟者：

政府早前發表《未服監禁刑罰人士喪失成為候選人的資格及其他相關事宜諮詢文件》，隨函附上香港經濟民生聯盟(經民聯)回應諮詢文件的意見書。如有任何問題，請與經民聯秘書處（電話：2520 1402）聯絡，謝謝！

香港經濟民生聯盟秘書處啟
2014年9月29日

香港經濟民生聯盟
Business and Professionals Alliance for Hong Kong

香港經濟民生聯盟
《未服監禁刑罰人士喪失成為候選人的資格及其他相關事宜公眾諮詢》
意見書

香港經濟民生聯盟一向尊重香港特別行政區立法會，以及致力維護立法會的莊嚴，以維持公眾對立法會及選舉制度的信心，確保立法會能順利運作，完成及完善其職能。

政制及內地事務局（局方）今年 7 月發表《未服監禁刑罰人士喪失成為候選人的資格及其他相關事宜公眾諮詢》（下稱《諮詢文件》），主要建議修訂《立法會條例》第 39 條。《諮詢文件》列出多個建議，其中包括容許正在保釋等候上訴及獲准緩刑的人士，參選立法會，經民聯對此有保留。

（一）局方建議

局方在《諮詢文件》中作出的建議，包括：

1. 維持因服刑而在囚人士喪失在立法會選舉中獲提名為候選人或當選資格的規定，包括《立法會條例》第 39 條的有關法例及《基本法》第 79 條（「建議 1」）；

2. 因現行選舉法例沒有條文暫緩獲准保釋等候上訴的人士等候上訴期間被取消參選及當選議員的資格，建議容許這類上訴人等候上訴期間參選立法會及當選為議員（「建議 2」）；

3. 建議容許被定罪但並非正服刑而受監禁的上訴人（例如緩刑案件、在監管下提早獲釋等[1]）參選立法會及當選為議員（「建議 3」）；

4. 建議透過法例澄清羈留在勞教中心、教導所、戒毒所、更生中心及懲教署精神病治療中心的人士均喪失在立法會選舉中獲提名為候選人及當選資格（「建議 4」）；

[1] 不包括逃犯

5. 傾向不取消在監管下提早釋放的囚犯[2]在立法會選舉中獲提名為候選人或當選的資格（「建議5」）；

6. 建議在監管下有條件被釋放的人士[3]喪失在立法會選舉中獲提名為候選人或當選資格（「建議6」）；及

7. 建議對《區議會條例》及《鄉郊代表選舉條例》作相應修訂（建議7」）。

（二）就建議1，4及6的回應

經民聯認同局方的建議1，4及6。聯盟贊同局方的理據，因容許被監禁人士暫時外出、接受探訪及與外界接觸，讓他們進行競選活動或履行立法會議員的職責，可能削弱甚至破壞監禁刑罰的本質，亦可能引起運作及保安方面的問題。

再者，這做法會令候選人及當選議員相比其他被監禁人士的地位較為優越，引起公平問題，令懲教所管理出現困難。制度亦有可能被用心不良者濫用。

至於勞教中心、教導所、戒毒所、更生中心及懲教署精神病治療中心等機構皆屬於羈管性質；被羈留人士在設施中人身自由受限制，並須嚴格遵從計劃的規例。限制他們參選立法會及當選的資格，亦屬合理。

另外，如《諮詢文件》所言，在監管下有條件被釋放的人士應被視作符合《立法會條例》第39(1d)條所指的正服刑，因此有關人士參選立法會及當選議員應受限制[4]。

[2] 根據《囚犯（監管下釋放）條例》第7(1)或7(2)條、《監管釋囚條例》第6(1)條或《長期監禁刑罰覆核條例》第15(1c)條，並包括《教導所條例》第5(1)條、《勞教中心條例》第5(1)條、《戒毒所條例》第5條和《更生中心條例》第6(1)條在監管下釋放的人士

[3]《長期監禁刑罰覆核條例》第15(1b)條

[4] 有條件釋放的目的是讓有關人士在監督下被釋放，以便利長期監禁刑罰覆核委員會考慮是否向行政長官建議將有關人士的無限期刑罰轉爲確定刑期。

（三）就建議 2，3，5 及 7 的回應

經民聯對建議 2，3，5 及 7 有保留。經民聯理解局方因兩宗司法覆核案中原訟法庭指出《立法會條例》第 39(1b)條與《香港人權法案》及《基本法》有抵觸，而展開此項公眾諮詢，研究如何保障該類人士的參選權。

聯盟認為，一旦修改法例，容許獲准保釋的上訴人、被定罪而被判緩刑的人士（不論正等待上訴與否）及在監管下獲提早釋放的人士（下稱「該類人士」）參選，如果一名犯人被判刑而他聲稱要上訴及要參選，法庭是否容許他保釋將直接決定他是否可以參選，但這不是法庭應該負的責任。因此，首要考慮因素，就是不應該將法庭政治化。

再者，有關修訂將為選舉帶來極大不確定性。局方在保障該類人士參選權的同時，亦應平衡選民、市民以及納稅人的權益。

首先，如上訴在提名期後但投票日前被駁回，原先成功成為候選人的該類人士將喪失候選資格，為選舉增添不確定性，對選民及其他候選人造成不公。

第二，如果該類人士是某選區或功能組別的唯一候選人，並在提名期後自動當選，但在正式上任立法會議員前因上訴失敗而被判監超過一個月、緩刑期內因犯事或違反緩刑條件、或在監管下因違反提早釋放條件等原因而被重新判監超過一個月，可能會被質疑喪失候選人資格。

若選舉主任信納該類人士在此情況下喪失候選資格[5]，選舉主任有可能宣布該地方選區或功能組別的選舉不能完成。即使選舉主任不接納該類人士因上述原因被判監超過一個月導致喪失候選資格，選民也可能根據《立法會條例》的相關條文提出選舉呈請。由此可見，容許該類人士參選及當選為選舉帶來不少不明朗因素。

再者，《基本法》第 79 條第 6 款訂明，若有立法會議員被判定罪及判監一個月以上，如經立法會出席議員三分之二通過，該議員會被宣告喪失議員資格。假如該類人士在選舉中當選，但隨後上訴失敗而被判監超過一個月、緩刑期內因犯

[5] 按《立法會條例》第 46A 條

事或違反緩刑條件、或在監管下因違反提早釋放條件等原因而被重新判監超過一個月，又經立法會出席議員三分之二通過，將喪失其議席。

如果議席出現空缺或選舉不能完成，政府須使用公帑舉行補選。補選要動用不少的公用資源，但該類人士付出的參選按金，相對補選的費用，只是九牛一毛，未能抵銷補選開支。況且，根據現行法例，如該類人士取得其參選地區或組別百分之三或以上的有效選票，選舉按金將獲全數退還[6]。如當選或取得百分之五或以上的有效選票，該類人士也可申請不超過法定上限的選舉開支資助[7]。

如立法會有議席出缺，將不利立法會運作及完成其職能，亦不利市民向所屬界別或選區議員求助表達他們的訴求。該類人士雖有較大的人身自由進行競選活動及履行立法會議員的職責，但如果其議席因上訴失敗或犯事等而喪失，這對其參選選區或組別的選民、求助的市民及納稅人皆不公平。

同樣，若在區議會選舉、村代表選舉及街坊代表選舉的相關法例作相應修訂，亦會為有關選舉帶來不確定性。

（四）總結

經民聯認同在囚人士、在監管下有條件被釋放的人士及羈留在勞教中心、教導所、戒毒所、更生中心及懲教署精神病治療中心的人士均應喪失在立法會選舉中獲提名為候選人及當選的資格。

容許獲准保釋的上訴人、被定罪而被判緩刑的人士(不論正上訴與否)及在監管下獲提早釋放的人士參選，雖可加強保障他們的被選舉權，但如當選後他們因上訴失敗、違反緩刑或提早釋放條件而被判監，有可能喪失立法會議員資格，為選舉制度帶來極大不確定性。這不利立法會的運作及監察政府，對選民並不公平。動用原可投放於其他經濟及民生問題的公共資源安排補選，亦非有效運用公帑及有效率地管理公共財政。

[6]《立法會（提名所需的選舉按金及簽署人）規例》第 4 條
[7]《立法會選舉活動指引》第十六章

經民聯理解局方就獲准保釋的上訴人、被判緩刑的人士及在監管下提早釋放的人士的參選權，提出建議作公眾諮詢的理據，但同時局方必須確保法庭不會被政治化，平衡選民及市民的權益，確保公帑運用得宜，選舉安排順利，立法會方可有效運作及行使其職能，服務市民。因此，經民聯對有關建議有保留，促請局方慎重審視。

（完）

就未服監禁刑罰人士參加立法會選舉的資格意見書

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History: This message has been replied to.

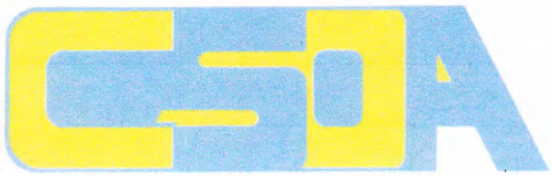
1 Attachment

就政制及內地事務局於2014年7月21日對未服監禁刑罰人士參加立法會選舉的資格諮詢文件回應_29.9.2014.pdf

致政制及內地事務局局長：

有關貴局於2014年7月21日對未服監禁刑罰人士參加立法會選舉的資格所發表的諮詢文件，懲教事務職員協會有以下意見和建議，謹希考慮。

鄭育良
懲教事務職員協會初級組主席



懲教事務職員協會

就未服監禁刑罰人士參加立法會選舉的資格意見書

就政制及內地事務局於2014年7月21日對未服監禁刑罰人士參加立法會選舉的資格所發表的諮詢文件，本會有**兩個意見:**

1. **支持**正服刑而受懲教署羈管的人士在立法會選舉中喪失獲提名為候選人或當選資格。
2. **反映**負責更生服務及執行監管職務的懲教人員，在監管接受法定監管下釋放的被定罪人士(“受監管者”)參選或執行議員職務時會遇上的困難。

從法律上，《立法會條例》第39(1)條已指出服刑而受監禁人士喪失資格的規定。《香港人權法案條例》第9條亦訂明在任何性質的懲治機構內受合法拘禁的人，受到為維持部隊紀律及囚禁紀律而不時由法律批准施加的限制所規限。因此，在《基本法》第26條及《香港人權法案》第21條有關參選權利的保障是可以受到合理的限制而非絕對權利。

從議會運作的角度上，受監管者在社會日常活動受到一定規限，基本上已限制了為所屬選區選民服務的能力。例如需要入住中途宿舍、於指定時間提交尿液樣本、或於指明時間逗留在呈報地址等，以至未能立時處理該選區的問題。因此，我們認為在懲教機構服刑人士無法有效地履行其職責，亦欠缺代表性。

從執行職務的角色上看，懲教人員除了根據工作守則和程序為受羈管人士提供安全的環境和適切的更生服務外，更要提供各種押解服務，包括押送受羈管人士到公立醫院求診、到法院應訊，甚或要處理緊急醫療事故和通宵看管於公立醫院留醫的受羈管人士等。監獄本身有既定的紀律及作息規律，參選或履行議會職務必定會破壞監獄紀律及製造特權份子。外出進行競選活動或履行議員職務動輒花上最少兩名押解人員、一名駕駛員和一部押解車輛。現時前線人員繁重的工作量根本不足以應付受羈管人士經常出入懲教機構。以懲教機構探訪設施接見選民或主持會議，亦會增加探訪室職員的壓力。

至於負責為受監管者提供更生服務及執行監管職務的懲教人員(“監管人員”)，在現實環境中，很有可能面對受監管者因為競選或執行當選後職務而無法遵守監管條例的情況，例如因通宵進行競選籌備活動而無法於指明時間逗留在呈報地址、於立法會議事廳(禁區範圍)開會而不能與監管人員見面等。我們認為同事在執行上會遇到困難。監管人員若因其特殊身份而批准未能完全遵守監管條例會構成不公平，但嚴正執法亦只會令該參選/當選人被召回懲教機構服刑，令其失去參與競選/履行職務的能力，直接影響該區選民。

因此，在《基本法》第26條及《香港人權法案》第21條有關參選權利的保障是可以受到合理的限制而參選權應屬於非絕對權利。我們認為在懲教署羈押人士和受監管者皆無法有效地履行其職責，亦欠缺代表性。監管人員在執行職務上亦會遇到困難。從選民福祉及議會運作效率上看，我們建議諮詢局考慮修例，訂明受監管者於監管期間喪失獲提名為候選人或當選資格。

懲教事務職員協會

二零一四年九月二十九日

「未服監禁刑罰人士喪失成為候選人的資格及其他相關事宜公眾諮詢」

當一個人被法庭判有罪同埋需要坐監後，果一刻，他已經要為所犯的事而承擔后果；果一刻，他已同一般公民有異；果一刻，他不能夠話想點就點。

基本法話香港特別行政區永久性居民依法享有選舉權和被選舉權，基本法都話香港居民享有言論、新聞、出版的自由，結社、集會、遊行、示威、通訊、遷徙、信仰、宗教和婚姻自由，以及組織和參加工會、罷工的權利和自由。請問是否應該俾坐監的人去集會、去遊行、去示威？

試想像當有 1000 個坐監的人提出要參選的時候（恕我誇張），是否每一位都要如咨詢文件 2.10 段所指可以暫時外出籌備選舉、接受探訪、接觸外界？又試想像有 50 個議員要坐監的時候（恕我再一次誇張），是否每一位都要暫時外出開會或處理議員事務？咁到最後個個坐監的人都會去參選，咁法庭判處的刑罰仲有什麼意義？所以我認為一日仲坐緊監，無論是坐哪類型的監，甚至 4.08 段所指的一切監管下提早釋放，一日都唔應該有權參選。

李先生

THE LAW SOCIETY OF HONG KONG
香港律師會

Practitioners Affairs

Our Ref :
Your Ref :
Direct Line :

CAHRC/14/1997452

30 September 2014

BY EMAIL & BY POST

Constitutional and Mainland Affairs Bureau
Government Secretariat
East Wing
Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

Attn: Miss Helen Chung

Dear Miss Chung,

Public consultation on Disqualification of Candidates with Unserved Prison Sentences and other Related Matters

We are pleased to attach the Law Society's submissions on the Public consultation on Disqualification of Candidates with Unserved Prison Sentences and other Related Matters for consideration by the Constitutional and Mainland Affairs Bureau.

Yours sincerely,

(Signed)

Kenneth Fok
Director of Practitioners Affairs

Encl.

THE LAW SOCIETY OF HONG KONG 香港律師會

Consultation Paper on Disqualification of Candidates with Unserved Prison Sentences and other Related Matters

Submissions of the Law Society of Hong Kong

1. The Law Society has reviewed the "Consultation Paper on Disqualification of Candidates with Unserved Prison Sentences and other Related Matters" and has the following comments.

Recommendation (para. 5.01(a) of the Consultation Paper): To maintain that any person serving a sentence of imprisonment be disqualified from being nominated as a candidate at a LegCo election and from being elected as a Legco member

2. Section 39(1)(d) of the Legislative Council Ordinance (Cap 542) (LCO) provides that

> (1) A person is disqualified from being nominated as a candidate at an election, and from being elected as a Member, if the person-
>
> ....
>
> (d) on the date of nomination, or of the election, is serving a sentence of imprisonment ...

It is proposed in the Consultation Paper that this provision should be maintained.

3. The aims behind section 39(1)(d) are listed in paragraphs 2.06 to 2.11 of the Consultation Paper, namely maintaining public confidence in the LegCo, ensuring proper operation of the LegCo and maintaining public confidence in the electoral process.

4. Section 39(1)(d) should be viewed in the context of the following provisions:

- Section 39(1)(e)(i) of LCO, which disqualifies from nomination or election a person who is or has been 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 3 months without the option of a fine, where the election is to be held or is held within 5 years after the date of the person's conviction.
- Article 79(6) of the Basic Law, which provides that a member of the LegCo shall be disqualified from the office if he is convicted and sentenced to imprisonment for one month or more for a criminal offence committed within or outside the HKSAR and is relieved of his or her duties by a motion passed by two-thirds of the members of the LegCo present.

5. The Law Society considers the gravity of the consequence attached to section 39(1)(d) is disproportionate to its aims, for the following reasons.

6. Section 39(1)(d) operates indiscriminately, irrespective of the nature, seriousness, relevancy and culpability of the offence committed. Any person who has been convicted of any offence in or outside Hong Kong, provided that the sentence is being served on the date of nomination or at the election, will automatically be barred from running for elections in Hong Kong. Thus, people who have been convicted under a different set of laws or legal systems in places outside Hong Kong, who might otherwise be wholly innocent under the local law will be barred; candidates who are subject to a minor conviction which has no apparent relevance to their suitability to stand for LegCo election would also be barred. The section is unfair and discriminatory.

7. Additionally, section 39(1)(d) may also catch those serving a short prison sentence in between the commencement of the nomination period and the date of election and, if otherwise allowed to stand as a candidate, would be released by the time the new term of office of LegCo commences.[1] Their right to stand for election during this period is automatically barred, even if the term of imprisonment is very short, e.g. one week. The Law Society questions whether the minor offending conduct with the sentences so attached could justifiably deprive the candidates their rights to be nominated.

[1] Discussed in *Wong Hin Wai v. Secretary for Justice* [2012] 4 HKLRD 70, at para. 109

8. The automatic disqualification of LegCo candidates currently provided for is arguably more stringent than the disqualification for those LegCo members holding office, as stipulated in Article 79(6) of the Basic Law. The principle adopted by the Administration in the Memorandum in July 1997 on Review of the Electoral Provisions Ordinance was that the disqualification for candidature / election should not be more restrictive than that for holding office.[2] In this regard, it is worth to note that:

   - while Article 79(6) of the Basic Law and Rule 4B of the Rules of Procedure of LegCo confer the power to other LegCo members to disqualify members, thereby reflecting the desirability of leaving the ultimate decision to the good sense of member of LegCo[3], section 39(1)(d) engages an *automatic* disqualification.

   - Article 79(6) of the Basic Law disqualifies a LegCo member from office if he is imprisoned for more than one month, and two-thirds of LegCo members present agree to relieve of his duties. Compare this to section 39(1)(d) which in essence disqualifies a person from office *even if* he is only serving a term of imprisonment much shorter than one month.

9. The Law Society notes that currently there is no discretion in the court to disapply the sanction or to mitigate the consequences.

Recommendation (para. 5.01(c) of the Consultation Paper): 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

10. The Law Society considers that the proposal is unnecessary because it would be a rare occasion for an escaped convict to efficiently and successfully run for an election. In all probabilities, it would be outrageous if an escaped convict could run away from the police and continue to escape scrutiny after he or she commences and/or participates in an election campaign.

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[2] *Ibid*, paras. 59-65

[3] *Chim Pui Chung v. President of the Legislative Council* [1998] 2 HKLRD 552

Alternative Proposals

11. The Law Society could propose the following alternative proposals:

(1) The whole section 39(1)(d) is repealed. The two safeguards existing in current laws, namely section 39(1)(e)(i) of the LCO and Article 79(6) of the Basic Law, should be sufficient to maintain public confidence in the LegCo and the integrity of LegCo elections.

Alternatively,

(2) The words *"or of the election"* in section 39(1)(d) is repealed, so that a person is disqualified only if he is serving a sentence of imprisonment on the date of nomination, rather than on the date of the election. The disqualification should not apply to a candidate serving imprisonment on date of the election, because if a candidate is in prison and can still win the election, the wishes of the electorate should be respected. Whether he should subsequently be disqualified from the office of a LegCo member should be decided by other members of the LegCo, in accordance with the procedures laid down in Article 79(6) of the Basic Law (provided he is not otherwise caught by other restrictions under section 39 of the LCO).

(3) In any event, if section 39(1)(d) is to be maintained, then the length of sentence which would lead to disqualification should be specified. The Law Society considers that the length of sentence specified should not be less than.one month, for two reasons:

- This is in line with Article 79(6) of the Basic Law which specifies a one-month period; and
- This can ensure candidates who have been convicted only of minor offences would not be disqualified.

(4) An independent body should be established to examine each case individually, based on its own merits and circumstances.

The Law Society of Hong Kong
30 September 2014

Views

to:
disqualification_consultation@cmab.gov.hk
30/09/2014 17:26
Hide Details
From:
To: disqualification_consultation@cmab.gov.hk,
History: This message has been replied to.

I suppose a legislator is to monitor the executive and should possess agreeable if not absolute virtue and integrity. I see no reason as to how these intrinsic qualities could be related to a person in prison or under punishment. Seeing lately some frantic lunatics protesting here and there, I suppose prisons or venues detaining teenagers close to the age qualified for elections should be discussed in your consultation.

Annex B

Summary of Views Received during the Public Consultation on Disqualification of Candidates with Unserved Prison Sentences and other Related Matters and the Administration's Initial Responses

According to the submissions received during the Public Consultation on Disqualification of Candidates with Unserved Prison Sentences and other Related Matters, more submissions were in support of the initial recommendations set out in the Consultation Paper on Disqualification of Candidates with Unserved Prison Sentences and other Related Matters ("the Consultation Paper") than those who were not. The detailed analysis is set out below.

(a) To maintain that any person serving a sentence of imprisonment be disqualified from being nominated as a candidate at a LegCo election and from being elected as a LegCo Member

2. A total of 14 submissions received commented on the proposal. A majority (about 71% of these submissions) supported the proposal. The remaining opposed the proposal.

3. The Business and Professionals Alliance for Hong Kong ("BPA") and the Correctional Services Officers' Association ("CSOA") indicated support for the proposal. It is considered that an imprisoned person will not be able to fully or effectively discharge his or her duties and responsibilities as a LegCo Member. If an imprisoned person is allowed timeout from imprisonment, as well as visits and outside contacts, for the purpose of conducting election campaigns or carrying out his or her duties and functions as a LegCo Member, it would undermine, if not impair, the essence of a custodial sentence, and may give rise to operational and security problems. Moreover, the BPA considers that this would put the election candidates and elected Members in a privileged position as compared to other prisoners in custody and give rise to an issue of equality to the detriment of penal institution management. The system may also be open to abuse by persons with ill will. The Society for Community Organization and the Hong Kong Human Rights Commission ("SOCO and HKHRC") considered the proposal reasonable in principle.

4. Four submissions expressed the views that a convicted person should fully serve the sentence imposed upon him or her in order to fulfill the retributive or rehabilitative aspect of that sentence. Therefore, a person sentenced to imprisonment by a court of law should not be regarded as a

suitable candidate for an important public office at least until the sentence has been fully served.

5. On the other hand, the Hong Kong Bar Association ("HKBA") was of the view that the HKSAR Government has failed to justify section 39(1)(d) of the LCO as a proportionate restriction of the constitutionally guaranteed fundamental right of HKSAR permanent residents to stand in elections. HKBA considered that section 39(1)(d) applied irrespective of the length of the unserved term of imprisonment; the Consultation Paper had not contained further research on the consequential matter of meaningful access to run the election campaign as raised by the CFI in the Judgment; and that voters in Hong Kong were intelligent enough to take into account the potential contingency of imprisonment of such candidate in deciding whether to cast their votes in favour of him or her.

6. The Law Society of Hong Kong ("the Law Society") also considered that the gravity of the consequence attached to section 39(1)(d) of the LCO was disproportionate to its aims because the provision operated indiscriminately, irrespective of the nature, seriousness, relevancy and culpability of the offence committed. It also mentioned that section 39(1)(d) may catch those serving a short prison sentence in between the commencement of the nomination period and the date of election and, if otherwise allowed to stand as a candidate, would be released by the time the new term of office of LegCo commences, and questioned whether the minor offending conduct with the sentences so attached could justifiably deprive the candidates their rights to be nominated. It also considered that the automatic disqualification of LegCo candidates currently provided for was arguably more stringent than the disqualification for those LegCo members holding office. It also noted that there was no discretion in the court to disapply the sanction or to mitigate the consequences. The Law Society made several alternative proposals in its submission[1].

7. The Administration has considered the views received during the consultation period, and sets out its further views below.

8. Both HKBA and the Law Society raised questions on the proportionality of section 39(1)(d). As elaborated in detail in Chapter Two of the Consultation Paper, the right to stand for election is not absolute and can be subject to reasonable and justifiable restrictions which satisfy the proportionality test. More specifically, the right to stand for election is subject to the exception in section 9 of the Hong Kong Bill of Rights Ordinance

[1] The Law Society proposed repealing section 39(1)(d); or disqualifying a person only if he is serving a sentence of imprisonment on the date of nomination rather than on the date of the election; or maintaining section 39(1)(d) whilst specifying that the length of sentence which would lead to disqualification should be no less than one month; or establishing an independent body to examine each case individually based on its own merits and circumstances.

(Cap. 383), which 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.

9. Generally speaking, the imposition of a prison term is indicative of the culpability of the offender and the seriousness of the offending conduct. Public views as summarised in paragraphs 3 and 4 above also support maintaining the existing restriction on persons serving a sentence of imprisonment taking into consideration the suitability of an imprisoned person to become a LegCo Member, the essence of a custodial sentence as well as operational, security and equality concerns.

10. The Administration notes that both HKBA and the Law Society are of the view that section 39(1)(d) is disproportionate as it applies so long as the person concerned remains in prison custody on the relevant day irrespective of the nature, seriousness, relevancy, culpability of the offence committed and the remaining length of imprisonment to be served.

11. The Administration has considered the views of HKBA and the Law Society. A person is disqualified from being nominated in an election and from being elected under section 39(1)(d) if the person is serving a sentence of imprisonment on either the date of nomination or the date of the election. Given that the date of nomination and the date of election are two crucial dates marking the beginning and the end of the overall election process, the Administration maintains that it would be reasonable to disqualify a person from being nominated and elected if the person is serving a sentence of imprisonment on either of the two dates. The Law Society also noted that currently there is no discretion in the court to disapply this sanction or to mitigate the consequences. The Administration notes that an appellant who is released on bail pending appeal would not be disqualified under section 39(1)(d), and when considering whether or not to grant bail pending appeal, the court will consider, among other things, the likelihood of the sentence being completed before the disposal of the appeal or of the appeal being allowed (see section 83Z of the Criminal Procedure Ordinance (Cap. 221)).

12. With regard to HKBA's view that section 39(1)(d) is disproportionate as it applies so long as the person concerned remains in prison custody on the relevant day irrespective of the length of the unserved term of imprisonment, the Administration noted that it is not always practical to determine the remaining length of imprisonment on the date of nomination or the date of election. For example, whether or not a prisoner would be granted remission will depend on his industry and good conduct.

13. As elaborated in footnote 11 of the Consultation Paper, whilst the CFI notes that section 39(1)(d) may catch those serving a short prison sentence who may have been released by the time the new term of office of LegCo membership commences, it also recognises that a number of questions have to be addressed in the assessment of the overall reasonableness of section 39(1)(d)[2]. Allowing an imprisoned person timeout from imprisonment, as well as frequent visits and other forms of outside contacts for the purpose of conducting election campaigns will give rise to operational, logistics, manpower resource and security problems. For example, CSD considers it necessary to have in place a security procedure to escort prisoners to an outside location, including security vetting of background of prisoner and security of the venue. This is for the protection of the public, as well as the prisoner himself or herself. It would be impossible for CSD to conduct reconnaissance of all canvassing venues and polling stations in advance to study the security measures. Besides, in prison setting, the prisoners would cease labour after 4pm and their normal movement would be suspended after 7pm. However, many election forums or canvassing activities are typically conducted in the evening time. It may give rise to grave security and operation concerns for CSD to arrange a candidate serving a sentence of imprisonment to attend such activities. Furthermore, section 48 of the Prison Rules (Cap. 234A) stipulates that friends and relatives of a prisoner shall be allowed to visit the prisoner twice a month and no more than three persons at one time. The frequent visit of a candidate serving a sentence of imprisonment for the purpose of conducting electoral campaign is beyond the handling capacity of visit facilities of penal institutions. The normal visit of other persons in custody may also be affected. This will also put the concerned election candidates (or elected Members, as the case may be) in a privileged position as compared to other prisoners in custody and give rise to an issue of equality to the detriment of penal institution management. There is also concern that the system may be open to abuse. The essence of a custodial sentence will be undermined, if not impaired, and purpose defeated, and the public interest in the integrity and effectiveness of our criminal justice system will be adversely affected.

14. It is also worth noting that in other jurisdictions, as mentioned in Chapter Two of the Consultation Paper, it is not uncommon that restrictions are imposed by law to restrict a person sentenced to a term of imprisonment from being nominated to stand for election. A summary of the practices of selected countries is at **Appendix**. It is noted that the practices vary among different countries and, similar to Hong Kong, Canada and New Zealand disqualify an

[2] Such as whether a candidate serving a prison sentence should be allowed timeout from imprisonment to conduct campaign (arguably the right to stand for election carries with it the right to 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, and how about security issues if such a candidate is allowed to have timeout, etc.

imprisoned person, regardless of length of imprisonment, from being a candidate.

15. In light of the above, the Administration considers that the justifications underpinning the long-established section 39(1)(d) of the LCO remain sound and valid, having considered questions raised by the CFI, reviewed the objectives and arguments set out in the Consultation Paper, and considered views received during the consultation period.

(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 LCO

16. A total of 12 submissions received commented on the proposal. Seven (about 58%) of these submissions supported the proposal. Four (about 33%) submissions opposed the proposal. One (about 8%) submission did not indicate agreement or objection to the proposal.

17. SOCO and HKHRC supported the proposal on the ground that the courts will consider, among other things, the likelihood of the appeal being allowed when considering whether or not to grant bail pending appeal. There are also views that liberty of a person on bail pending appeal is not or less restricted than a person serving a sentence of imprisonment, and is able to conduct election campaigns and carry out his or her duties and functions as a LegCo Member, if allowed to be nominated as a candidate at a LegCo election and be elected as a LegCo Member.

18. BPA opposed the proposal and considered that whether a convicted person pending appeal is allowed to stand for election would depend on whether the court grants bail to the convicted person, and the court should not bear such responsibility. Besides, the proposal may give rise to uncertainty in the electoral process because if the appeal of a candidate is dismissed subsequently, he or she will become disqualified as a candidate, or, if elected, may have to vacate his or her seat. In case of vacancies, resources would be required to conduct by-elections and the operation of LegCo would be adversely affected, hence unfair to the relevant electors, members of the public and taxpayers. Besides, there are views that a person on bail pending appeal has been found guilty by the lower courts and such ruling is not overturned

when an appellant is released on bail pending appeal. This calls into question the person's judgment and conduct.

19. The Administration has considered BPA's concerns regarding the court's role in granting bail pending appeal and its impact on whether a person is disqualified from standing for election. The Administration notes that the courts have a discretion as to whether or not to grant bail pending appeal, and may consider all such matters that appear relevant to the court, which may include the impact on a person's right to stand for election as constitutionally protected under Article 26 of the Basic Law and Article 21 of the Hong Kong Bill of Rights.

20. The Administration also takes note of BPA's concerns that to allow an appellant who is released on bail pending appeal to stand for election might give rise to uncertainty in the electoral process. However, this concern already exists in the current electoral system by virtue of the application of the general provision in Rule 29 of the Criminal Appeal Rules (Cap. 221A). The Administration's intention is 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.

(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

21. A total of eight submissions received commented on the proposal. Five (about 63%) of these submissions supported the proposal. The remaining opposed the proposal.

22. Among the submissions which supported the proposal, there are views that if an appellant is serving a sentence of imprisonment, his or her liberty is restricted. Such a person will not be able to conduct election campaign or discharge his or her duties and responsibilities as a LegCo Member. Moreover, this would not put the person in a privileged position as compared to other prisoners in custody. There are also views that a convicted person should fully serve the sentence imposed upon him or her in order to fulfill the retributive or rehabilitative aspect of that sentence. Therefore, a person sentenced to imprisonment by a court of law should not be regarded as a suitable candidate for an important public office at least until the sentence has been fully served.

23. SOCO and HKHRC opposed the proposal and considered that when considering whether or not to grant bail pending appeal, the court will consider not only the likelihood of appeal being allowed but also the likelihood that all

or a substantial part of the sentence will be served before the disposal of the appeal. A person sentenced to a long term imprisonment would find it more difficult to obtain bail and hence may be disqualified from standing for election. Also, SOCO and HKHRC considered that the Administration should seek to overcome the practical difficulties that will arise if persons who are serving a sentence of imprisonment and pending appeal are allowed to stand for election.

24. The Administration has considered the views of SOCO and HKHRC and notes that the likelihood that all or a substantial part of the sentence will be served before the disposal of the appeal is only one of the factors that the courts will consider in deciding whether or not to grant bail pending appeal. The courts may also consider the likelihood of appeal being allowed and any other matter that appears to the court to be relevant. With regard to persons who are sentenced to long term imprisonment, the sentence is indicative of the seriousness of the offending conduct. If the courts, having considered the likelihood of appeal being allowed among other factors, decide not to grant bail pending appeal, then such person (who has committed a serious crime resulting in long term imprisonment and whose appeal lacks serious merits) should not be allowed to stand for election. As regards the difficulties for an imprisoned person to conduct election campaigns or carry out his or her duties, they are elaborated in paragraph 13 above.

(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 imprisonment[3]

25. A total of six submissions received commented on the proposal. A majority (about 83% of these submissions) supported the proposal. The remaining one opposed the proposal.

26. For submissions supporting the proposal, there are views that liberty of a person not serving a sentence of imprisonment is not or less restricted, and he or she is able to conduct election campaigns and carry out his or her duties and functions as a LegCo Member.

27. BPA opposed the proposal with consideration as set out in paragraph 18 above.

28. In summary, more submissions are in favour of the proposed specific regime in respect of disqualification (or not) for election-related purposes concerning a person pending appeal. The views tendered for or against the proposed specific regime are largely the same as those set out in the

[3] Except an escaped convict

Consultation Paper. Having considered these views, the Administration proposes to maintain its proposal which was made on balance of these considerations.

(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

29. A total of eight submissions received commented on the proposal. Four (50%) of these submissions supported the proposal. Two (25%) submissions opposed the proposal. Two (25%) submissions did not indicate agreement or objection to the proposal.

30. A few submissions supported the proposal, and tendered the views that an escaped convict should be disqualified from standing for election. Otherwise, it would adversely affect public confidence in the LegCo and proper operation of the LegCo.

31. Those opposing the proposal held a general view that none of the categories of persons mentioned in the Consultation Paper should be disqualified from being nominated, elected or serving as LegCo members and the restriction imposed should be relaxed or at least the status quo should be maintained.

32. Apart from the above views, HKBA and the Law Society made other comments. HKBA endorsed the view of the Judgment that "it is actually difficult to envisage an escaped convict standing for election, at least not one who is being convicted by a court in Hong Kong or a jurisdiction with which we have extradition arrangement". The Law Society considered that the proposal was unnecessary because it would be a rare occasion for an escaped convict to efficiently and successfully run for an election.

33. Having considered views received during the consultation period, the Administration maintains its views that even though the chances of an escaped convict standing for election may arguably be small, the Administration considers it reasonable as a matter of principle to make clear that all escaped convicts should be disqualified from being nominated as a candidate at a LegCo election and being elected as a LegCo Member, irrespective of the gravity of his or her offence and punishment or whether he or she is waiting for the determination of an appeal.

(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 CSD Psychiatric Centre from being nominated as a candidate at a LegCo election and from being elected as a LegCo Member

34. A total of 11 submissions received commented on the proposal. Six (about 55%) of these submissions supported the proposal. Two (about 18%) submissions opposed the proposal. Three (about 27%) submissions did not indicate agreement or objection to the proposal.

35. Submissions from BPA and CSOA indicated support for the proposal. There are views suggesting that these alternative penal establishments are all custodial in nature and a person detained in these establishments will have his or her liberty restricted and have to closely follow and abide by the relevant rules and regulations of the respective schemes. Such a person will not be able to conduct election campaign or discharge his or her duties and responsibilities as a LegCo Member. Besides, CSOA considered that if a person detained in these establishments is allowed timeout from imprisonment, as well as visits and outside contacts, for the purpose of conducting election campaigns or carrying out his or her duties and functions as a LegCo Member, it may give rise to operational problems and put the election candidates and elected Members in a privileged position as compared to other persons detained in these establishments and give rise to an issue of equality to the detriment of penal institution management.

36. Similar to the views in paragraph 30 above, there are views that allowing a person who has escaped from these alternative establishments to stand for election would adversely affect public confidence in the LegCo and proper operation of the LegCo.

37. SOCO and HKHRC did not expressly comment on this proposal, but suggested that a person detained in these alternative penal establishments is similar to an appellant serving a sentence of imprisonment, and hence such a person (presumably referring to an appellant detained in these alternative penal establishments) should be allowed to stand for election. The Administration's response at paragraph 24 above similarly applies here.

38. Having considered views received during the consultation period, the Administration proposes that a person who is serving detention in or who has escaped from Detention Centres, Training Centres, Drug Addiction Treatment Centres, Rehabilitation Centres or a CSD Psychiatric Centre should be disqualified from being nominated as a candidate at a LegCo election and from being elected as a LegCo Member.

39. We noted that HKBA has, in its submission, made suggestions on the legislative amendments to take forward this proposal. Specifically, HKBA considered that in most cases, a textual modification of section 39(1)(e)(i) of the LCO would be a sufficient means to address the matter[4], and a person who is required to be treated in a CSD Psychiatric Centre may be disqualified by virtue of section 39(2) or (3) of the LCO. For the avoidance of doubt, we would like to point out that our proposal is to disqualify persons serving detention in the captioned alternative penal establishments on the date of nomination or of the election. It is not our intention to apply section 39(1)(e)(i) of LCO so as to ban any person who, within the past five years, have served detention in the captioned alternative penal establishments for more than three months. For the sake of clarity, we propose making specific provisions to cover the captioned persons in the legislative exercise.

(e) To allow a convicted person who is released under supervision 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

40. A total of 12 submissions received commented on the proposal. Six (50%) of these submissions supported the proposal. The other six (50%) opposed the proposal.

41. HKBA is of the view that the proposal to enable persons who has been released under supervision to stand in LegCo elections to be one that ought to be encouraged. SOCO and HKHRC agreed that a convicted person who is released under supervision should be allowed to be nominated as a candidate and be elected as a Member, so long as he or she remains subject to the full rigours of the supervision regime and conditions and is not recalled to prison or the relevant alternative penal establishments.

42. BPA opposed the proposal and suggested that if a convicted person released under supervision is in breach of any supervision condition and is recalled to prison subsequently, he or she will become disqualified as a candidate, or, if elected, may have to vacate his or her seat. If vacancies arise as a result, resources would be required to conduct by-elections and the operation of LegCo would be adversely affected, which would be unfair to the relevant electors, members of the public and taxpayers. CSOA considered that a convicted person released under supervision may not comply with the

[4] HKBA noted that the usual period of detention, training or treatment in these correctional institutions exceeds three months, with the exception of a CSD Psychiatric Centre, which may be for a duration shorter than or of three months.

conditions set out in the supervision order while conducting election campaigns or carrying out his or her duties and functions as a LegCo Member. Moreover, officers of CSD will be put in a difficult position when trying to enforce such an order. If the supervision conditions were strictly enforced, it was likely that the person would be recalled to prison, rendering him or her unable to participate in the election campaign or discharge the duties and responsibilities as a LegCo Member. There are also views that allowing a convicted person released under supervision to stand for election would adversely affect public confidence in the LegCo and proper operation of the LegCo, and would undermine the retributive and rehabilitative aspect of that sentence.

43. While there are diverse views on this proposal, as mentioned in the Consultation Paper, 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. 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.

44. Taking into account views received during the consultation period and the considerations as set out in the Consultation Paper, the Administration proposes to allow a convicted person who is released under supervision[5] 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.

[5] 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) or section 6(1) of the Rehabilitation Centres Ordinance (Cap. 567) as proposed in the Consultation Paper. We also propose that persons released under supervision under section 109AA of the Criminal Procedure Ordinance (Cap. 221) should be covered as well.

(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

45. A total of 10 submissions received commented on the proposal. A majority (70% of these submissions) supported the proposal. The remaining opposed the proposal.

46. BPA supported the proposal and agreed that 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 should be taken to be serving the sentence within the meaning of section 39(1)(d) of the LCO under the existing legislation and hence should be disqualified from being nominated as a candidate at a LegCo election or from being elected as a LegCo Member. CSOA also supported the proposal with justification as set out in paragraph 42 above. There are views that allowing such a person to stand for election would adversely affect public confidence in the LegCo and proper operation of the LegCo.

47. SOCO and HKHRC opposed the proposal and considered that 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, similar to a convicted person who is released under supervision, should also be allowed to be nominated as a candidate and be elected as a Member.

48. Having considered views received during the consultation period, and for the reasons set out in paragraph 4.09 of the Consultation Paper, the Administration proposes that 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 be disqualified from being nominated as a candidate at a LegCo election and from being elected as a LegCo Member.

(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

49. A total of six submissions received commented on the proposal. A majority (about 67% of these submissions) supported the proposal. The remaining opposed the proposal.

50. The HKBA considered that prisoners who are on a leave of absence from imprisonment pursuant to the exercise of the discretionary power of the Commissioner of Correctional Services should be disqualified from candidature

in LegCo elections. There are also views that allowing such a person to stand for election would adversely affect public confidence in the LegCo and proper operation of the LegCo.

51. Those opposing the proposal considered that in general, none of the categories of persons mentioned in the Consultation Paper should be disqualified from being nominated, elected or serving as LegCo members. The restriction imposed should be relaxed or at least maintain the status quo.

52. As mentioned in the Consultation Paper, whilst 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 is temporarily out of custody at the particular time, 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.

53. Taking into account views received during the consultation period and the considerations as set out in the Consultation Paper, the Administration proposes 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 from being nominated as a candidate at a LegCo election and from being elected as a LegCo Member. For similar reasons, we propose to disqualify also those who have been granted leave of absence from detention in the alternative penal establishments under the supervision of CSD.

(h) To make corresponding changes to relevant provisions in the DCO and the RREO on disqualifying persons from being nominated as a candidate and from being elected, having regard to changes from (a) to (g) above

54. A total of seven submissions received commented on the proposal. Four (about 57%) of these submissions supported the proposal. One (about 14%) submission opposed the proposal. Two (about 29%) submissions did not indicate agreement or objection to the proposal.

55. HKBA is of the general view that while there should be a reformulation of the relevant provisions of the DCO and RREO concerning disqualification of persons from candidature due to his or her conviction of certain criminal offences or having an unserved prison sentence, the corresponding exercise ought to take account of the functions and duties of these electoral institutions and their more intimate connections with the community, so that greater participation from willing members of the public should be enabled and encouraged. Viewed from this perspective, it may be

justified to put in place more relaxed disqualification provisions for these electoral institutions than for the LegCo.

56. We have considered HKBA's comments. We consider that whilst DC members and Rural Representatives do not assume the constitutional role of a member of the legislature, they perform an important role in the public administration framework in Hong Kong, and in advising the Government on district administration, rural and other affairs. Hence, we consider that the three objectives disqualification provisions in the legislative regime serve legitimate aims, which include maintaining public confidence in the council or committee; ensuring the proper operation of the council or committee; and maintaining public confidence in the electoral process, should also apply to DC members and Rural Representatives as they do to LegCo Members.

57. SOCO and HKHRC considered that their views on the initial recommendations mentioned in the above paragraphs (some of which may not be the same as the changes proposed by the Administration in (a) to (g) above) were equally applicable to elections for DC members and Rural Representatives. BPA considered that its different views in (b)(i), (b)(iii) and (e) above were equally applicable to elections for DC members and Rural Representatives.

58. Taking into account views received during the consultation period, the considerations as set out in the Consultation Paper, the Administration proposes to make corresponding changes to relevant provisions in the DCO and the RREO on disqualifying persons from being nominated as a candidate and from being elected, having regard to changes from (a) to (g) above.

(i) To make changes in the DCO and RREO to make it clear that a DC member/Rural Representative who was previously disqualified from holding office on conviction of certain offences and/or sentenced to imprisonment 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) instead of the date of disqualification

59. A total of four submissions received commented on the proposal. A majority (75% of these submissions) supported the proposal. No submissions opposed the proposal. One (25%) submission did not indicate agreement or objection to the proposal.

60. Among the submissions supporting the proposal 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), there are views that the proposal would ensure parity of treatment for all and remove legal ambiguity.

61. Taking into account views received during the consultation period, the Administration proposes to make changes in the DCO and RREO to make it clear that a DC member/Rural Representative who was previously disqualified from holding office on conviction of certain offences and/or sentenced to imprisonment 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) instead of the date of disqualification (if it is different from the date of conviction).

62. We note that HKBA has remarked that this matter can be addressed as a miscellaneous amendment to electoral legislation to be inserted as part of a composite Bill that may be introduced from time to time to make a basket of changes to electoral legislation. It needs not be tied up with the reformulation of disqualification provisions of persons from candidature due to his or her conviction of certain criminal offences or having an unserved prison sentence. As legislative amendments are required to take forward other proposals relating to disqualification of candidates, the Administration suggests taking the opportunity of the same exercise to address this technical matter.

Other Comments Received from the Public Consultation Exercise

Review and reformulation of relevant provisions

63. HKBA suggested that the Administration should conduct, as a matter of priority, a review of all the disqualification provisions in section 39(1) of the LCO in respect of persons who have an unserved sentence of imprisonment and should span at least sections 39(1)(b), (d) and (e) of the LCO with a view to reformulating the provisions. Besides its views on section 39(1)(d) (see paragraph 5 above), HKBA considered that the HKSAR Government has failed to maintain that section 39(1)(b)(i) of the LCO is a justified restriction of the constitutionally guaranteed fundamental right of HKSAR permanent residents to stand in elections. It also considered that section 39(1)(e)(i) of the LCO does not sit well with the opening words of the paragraph (e), which limits the application of sub-paragraph (i) to where an election is to be held or is held within 5 years after the date of the person's conviction. HKBA also suggested the Administration to consider whether the language of section 39(1)(e)(i) of the LCO, unshackled from the said opening words, can be a worthy substitute for section 39(1)(b).

64. In response to HKBA's suggestion, we would like to explain the approach we have taken in the review. As detailed in Chapter Two of the Consultation Paper, the Administration has reviewed the disqualification provisions of the LCO in relation to sentence of death or imprisonment and the historical development of the regime in our electoral laws. The

Administration considers that, broadly speaking, the three objectives that the disqualification provisions in the legislative regime aim to serve (i.e., maintaining public confidence in the LegCo; ensuring the proper operation of the LegCo; and maintaining public confidence in the electoral process), which are also recognised by the CFI as legitimate aims, remain valid.

65. The Administration emphasises that it does not intend to maintain section 39(1)(b)(i) of the LCO in the general and wide terms that the CFI had rejected in the Judgment. Rather, the Administration has considered the different types of persons with unserved prison sentences covered by sections 39(1)(b) and (d) of the LCO which are the impugned provisions in the two CFI cases (in particular, persons on bail pending appeal, escaped convicts and persons serving a sentence of imprisonment), and set out in Chapter Three of the Consultation Paper the relevant considerations and initial recommendations regarding such persons. The Consultation Paper then considered whether the initial recommendations concerning sections 39(1)(b) and (d) of the LCO can be similarly applied (with necessary changes) to other provisions related to conviction and/or sentence under section 39(1) of the LCO. For example, paragraph 3.10(c) of the Consultation Paper proposes that, similar to persons on bail pending appeal, an appellant who may be disqualified under section 39(1)(e) of the LCO in relation to a conviction and/or sentence 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 the person is not serving a sentence of imprisonment.

Disclosure requirement

66. One submission suggested that candidates who are pending appeal (including on bail pending appeal) or released under supervision should disclose this position to electors so that electors could be aware of the uncertainty involved and make an informed decision. We will consider the merits and feasibility of this suggestion in working out the practical electoral arrangements.

Appendix to Annex B

Overseas Practices on Disqualification of Candidates Serving a Sentence of Imprisonment

Countries	Disqualification of Candidates Serving a Sentence of Imprisonment
Australia	Any person who has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer; shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.
Canada	A person who is imprisoned in a correctional institution is not eligible to be a candidate.
Finland	There is no restriction disqualifying a person serving a sentence of imprisonment from being nominated as a candidate and from being elected.
New Zealand	A person who is detained in a prison pursuant to a sentence of imprisonment imposed after the commencement of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 shall not be qualified to be a candidate or to be elected.
The United Kingdom	A person found guilty of one or more offences (whether in the United Kingdom or elsewhere), and sentenced or ordered to be imprisoned or detained indefinitely or for more than one year, shall be disqualified for membership of the House of Commons while detained anywhere in the British Islands or the Republic of Ireland in pursuance of the sentence or order or while unlawfully at large at a time when he would otherwise be so detained. If a person disqualified for membership of the House of Commons is elected to that House his election shall be void; and if such a person is nominated for election as a member of that House his nomination shall be void.
Sweden	There is no restriction disqualifying a person serving a sentence of imprisonment from being nominated as a candidate and from being elected.

Annex C

The Administration's proposed recommendations regarding disqualification from being nominated as a candidate at a Legislative Council, District Council or Rural Representative election and from being elected

The Administration proposes the following recommendations regarding disqualification from being nominated as a candidate and from being elected –

(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 otherwise for election-related purposes concerning a person pending appeal[1], 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 ("LCO") (Cap. 542);

(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[2]; and

(iii) to treat an appellant who may be disqualified under other provisions of section 39 of LCO in relation to a conviction

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[1] "Pending appeal" in this context includes (a) the statutory period of 14 or 28 days for defendants to lodge an appeal or apply for leave to appeal against his conviction/ sentence of imprisonment in a Hong Kong law court; or (b) the period when the convicted person has lodged an appeal to the appellate cour or has applied for leave to appeal until the determination of the appeal. For (a), if the conviction / sentence of imprisonment is handed down by a law court outside Hong Kong, the relevant period is (i) the statutory period allowed by the concerned jurisdiction outside Hong Kong for defendants to lodge an appeal or apply for leave to appeal or (ii) 28 days, whichever is the shorter.

[2] If an appellant who was serving a sentence of imprisonment is subsequently granted bail before being nominated, such a person will 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.

and/or sentence similarly as a person under (i) above, so long as the person is not serving a sentence of imprisonment[3];

(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;

(d) 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 ("CSD") 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 supervision[4] 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) and a person who has been granted leave of absence from detention in the alternative penal establishments under the supervision of CSD 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

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[3] Except an escaped convict.

[4] Pursuant to section 109AA of the Criminal Procedure Ordinance (Cap. 221), 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) or section 6(1) of the Rehabilitation Centres Ordinance (Cap. 567).

disqualifying persons from being nominated as a candidate and from being elected, having regard to changes from (a) to (g); and

(i) to make changes in the DCO and the 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 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).

Annex D

The Administration's proposed recommendations regarding disqualification of District Council members and Rural Representatives from holding office

The Administration proposes the following recommendations regarding disqualification of District Council ("DC") members and Rural Representatives from holding office –

(a) to maintain that an elected DC member or Rural Representative who has been sentenced to imprisonment (whether suspended or not) after being elected for a term of three months or less should not be disqualified from holding office, so long as he or she is not otherwise caught by other restrictions under section 24 of the District Councils Ordinance (Cap. 547) ("DCO") or section 9 of the Rural Representative Election Ordinance (Cap. 576) ("RREO") respectively;

(b) (subject to (d) below) to maintain the existing section 24(1)(d)(i) of DCO and section 9(1)(d)(i) of RREO that after being elected, an elected DC member or Rural Representative who 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 should be disqualified from holding office;

(c) (subject to (d) below) 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 that after being elected, an elected DC member or Rural Representative who is convicted of certain specified offences[1] should be disqualified from holding office;

(d) to provide that where an elected DC member or Rural Representative 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 –

[1] Including conviction 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).

(i) for convictions and sentences in Hong Kong, the end of the statutory period for defendants to lodge an appeal or to apply for leave to appeal (i.e. 14 days for appeal cases from the Magistrates' Courts and 28 days for other cases);

(ii) for convictions and sentences outside Hong Kong, the end of the statutory period for defendants to lodge an appeal or to apply for leave to appeal in the place where the defendant was convicted and sentenced, or within 28 days from the date of the decision appealed against, whichever is shorter; and

(iii) in the event of a relevant appeal against conviction or sentence (as the case may be) having been lodged or an application for leave to appeal having been submitted, 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;

(e) to disqualify all escaped convicts 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;

(f) (subject to (d) above) to disqualify a person who, after being elected, is required to serve detention in Detention Centres, Drug Addiction Treatment Centres, Rehabilitation Centres under the supervision of the Correctional Services Department ("CSD") or a CSD Psychiatric Centre for a period exceeding three months from holding office;

(g) (subject to (d) above) to immediately disqualify a person who, after being elected, is required to serve detention in Training Centres from holding office;

(h) (notwithstanding (d) above) to disqualify a person who has escaped from Detention Centres, Training Centres, Drug Addiction Treatment Centres, Rehabilitation Centres under the supervision of CSD or a CSD Psychiatric Centre (including one who has absconded during post-release supervision if applicable) from holding office;

(i) to disqualify the following elected DC members or Rural Representatives from holding office under section 24(1)(d) of the DCO or section 9(1)(d) of the RREO, as the case may be: elected DC members or Rural Representatives who were convicted of specified offences or sentenced to imprisonment before being elected, but were not disqualified from standing for election whilst pending appeal (so long as he or she was not serving a sentence of

imprisonment) or whilst he or she was released under supervision, but 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); and

(j) to make corresponding changes to disqualification of an appointed DC member and *ex officio* DC member from holding office, *mutatis mutandis*.