

# 立法會

## *Legislative Council*

LC Paper No. CB(2)267/14-15(04)

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### **Panel on Constitutional Affairs**

#### **Background brief prepared by the Legislative Council Secretariat for the meeting on 17 November 2014**

#### **Consultation report on disqualification of candidates with unserved prison sentences and other related matters**

### **Purpose**

This paper gives an account of the discussion of the Panel on Constitutional Affairs ("the Panel") on the Consultation Paper on "Disqualification of candidates with unserved prison sentences and other related matters" ("Consultation Paper").

### **Background**

2. The Legislative Council Ordinance ("LCO") (Cap. 542) governs, among other things, the conduct of the election of the Legislative Council ("LegCo") Members. Section 39 of LCO (**Appendix I**) sets out the circumstances in which a person is disqualified from being nominated as a candidate at a LegCo election and from being elected as a LegCo Member. Section 39(1)(b) and section 39(1)(d) of LCO specifically relate to the disqualification of a person with an unserved sentence of death or imprisonment and a person serving a sentence of imprisonment respectively.

3. However, in two consolidated judicial review cases on the right of persons with unserved prison sentences to be qualified as candidates for LegCo elections<sup>1</sup>, the Court of First Instance ("CFI") delivered oral and written judgment on 14 and 21 June 2012 respectively which declared section 39(1)(b) of LCO unconstitutional. CFI commented, but made no ruling, on the constitutionality of section 39(1)(d) of LCO.

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<sup>1</sup> *Wong Hin Wai v Secretary for Justice (HCAL 51/2012)* and *Leung Kwok Hung v Secretary for Justice (HCAL 54/2012)*. In both cases, the applicants had been convicted by a court of law and sentenced to imprisonment. Both appealed against the conviction and sentence, and were granted bail pending appeal. They challenged the constitutionality of the disqualification provisions of section 39(1)(b)(i) and section 39(1)(d) of LCO by means of judicial review.

4. On 12 July 2012, the Administration announced its decision not to appeal against the judgment. The Administration considered that section 39(1)(b) was enacted to serve legitimate aims, and there was a need to carefully re-examine the reasons for and against disqualification of candidates at a LegCo election. The Administration undertook to conduct a review on the qualification of persons with unserved prison sentences as candidates for LegCo elections.

5. On 21 July 2014, the Administration published the Consultation Paper, which seeks to collect public views on the disqualification of persons with unserved prison sentences as candidates at a LegCo election and other related matters. It is proposed in the Consultation Paper that an appellant who is convicted of certain specified offences<sup>2</sup> or sentenced to imprisonment but is not serving a sentence of imprisonment (e.g. persons released on bail pending appeal, persons on suspended sentence, persons on early release under supervision or persons who have completed their sentences), or a person who is released under supervision<sup>3</sup>, would not be disqualified from being nominated as a candidate at a LegCo election and from being elected as a LegCo Member. The Administration's initial proposals as set out in paragraph 5.01 of the Consultation paper are in **Appendix II**.

### **Panel's discussion on the Consultation Paper**

6. At the Panel meeting on 21 July 2014, the Administration consulted members on its initial proposals in the Consultation Paper. The major issues raised by members are summarized in ensuing paragraphs.

7. Hon Cyd HO considered that there was a rising trend of instituting political prosecution against participants of public meetings and processions. She enquired whether such persons would be disqualified from being nominated as a candidate at a LegCo election and from being elected as a LegCo Member. The Administration disagreed that there was political prosecution in Hong Kong, and explained that the current recommendation was to maintain that any person serving a sentence of imprisonment be disqualified, regardless of the type of offences committed by the person.

8. Noting that the Administration was inclined not to disqualify a convicted person who was released under supervision, Hon CHAN Chi-chuen asked

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<sup>2</sup> Including offences as stipulated in sections 39(1)(c), (e)(ii), (e)(iii) and (e)(iv) of LCO. Please see **Appendix I**.

<sup>3</sup> Pursuant to section 7(1) or (2) of the Prisoners (Release under Supervision) Ordinance (Cap. 325), section 6(1) of the Post-Release Supervision of Prisoners Ordinance (Cap. 475), section 15(1)(c) of the Long-term Prison Sentences Review Ordinance (Cap. 524), section 5(1) of the Training Centres Ordinance (Cap. 280), section 5(1) of the Detention Centres Ordinance (Cap. 239), section 5 of the Drug Addiction Treatment Centres Ordinance (Cap. 244) and section 6(1) of the Rehabilitation Centres Ordinance (Cap. 567).

whether legislative amendments would be required to make this clear. The Administration acknowledged that there was uncertainty in the existing laws regarding such circumstances. The Administration recapitulated that on 21 June 2012, CFI handed down its written judgment in a judicial review that section 39(1)(b) of LCO was inconsistent with Articles 26 and 39 of the Basic Law as well as Article 21 of the Hong Kong Bill of Rights. CFI commented, but made no ruling, on the constitutionality of section 39(1)(d) of LCO which restricted a person serving a sentence of imprisonment from standing for a LegCo election. Therefore, the existing section 39(1)(d) of LCO remained valid. On the other hand, CFI struck down section 39(1)(b) of LCO as a whole. However, because the applicants of the judicial review in question were persons convicted and sentenced to imprisonment but released on bail pending appeal, CFI's ruling left open for argument that the disqualification of persons with unserved sentences (e.g. convicted person who was released under supervision) but not in exactly the same circumstances as the applicants of the judicial review in question might still be justifiable.

9. Members also enquired whether the existing law already provided that a person who was serving detention in or who had escaped from Detention Centres, Training Centres, Drug Addiction Treatment Centres, Rehabilitation Centres or a Correctional Services Department Psychiatric Centre was disqualified from being nominated as a candidate at a LegCo election and from being elected as a LegCo Member. The Administration advised that while these institutions were custodial in nature similar to the prison regime, these institutions were not "prisons" as such. The Administration was of the view that clarification was required for this point for the avoidance of doubt.

### **Recent development**


10. The public consultation for the Consultation Paper was closed on 30 September 2014. The Administration will consult the Panel on the outcome of the consultation exercise and the Administration's proposed way forward at the next Panel meeting on 17 November 2014.

### **Relevant papers**

11. A list of the relevant papers available on the LegCo website (<http://www.legco.gov.hk>) is in **Appendix III**.

## Appendix I

### Contents of Section

Chapter:	542 	Title:	<b>Legislative Council Ordinance</b>	Gazette Number:	2 of 2011; 12 of 2012; G.N. 5176 of 2012
Section:	39	Heading:	<b>When person is disqualified from being nominated as a candidate and from being elected as a Member</b>	Version Date:	01/10/2012

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

(a) is-

- (i) a judicial officer; or
- (ii) a prescribed public officer; or
- (iii) an officer of the Legislative Council or a member of staff of The Legislative Council Commission; or (Amended 48 of 1999 s. 24)

(b) has, in Hong Kong or any other place, been sentenced to death or imprisonment (by whatever name called) and has not either-

- (i) served the sentence or undergone such other punishment as a competent authority may have been substituted for the sentence; or
- (ii) received a free pardon; or

(c) has been convicted of treason; or

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

(e) without limiting paragraph (b), where the election is to be held or is held within 5 years after the date of the person's conviction, is or has been convicted-

- (i) in Hong Kong or any other place, of an offence for which the person has been sentenced to imprisonment, whether suspended or not, for a term exceeding 3 months without the option of a fine; or
- (ii) of having engaged in corrupt or illegal conduct in contravention of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap 554); or
- (iii) of an offence against Part II of the Prevention of Bribery Ordinance (Cap 201); or
- (iv) of any offence prescribed by regulations in force under the Electoral Affairs Commission Ordinance (Cap 541); or (Replaced 10 of 2000 s. 47)

(f) is-

- (i) ineligible to be a candidate, or to be elected as a Member, at the election; or
- (ii) disqualified from being a candidate, or from being elected as a Member, at the election, because of the operation of this or any other law; or

(g) is a representative or salaried functionary of a government of a place outside Hong Kong; or

(h) is a member of any national, regional or municipal legislature, assembly or council of any place outside Hong Kong, other than a people's congress or people's consultative body of the People's Republic of China, whether established at the national or local level; or

(i) is an undischarged bankrupt or, within the previous 5 years, has either obtained a discharge in bankruptcy or has entered into a voluntary arrangement within the meaning of the Bankruptcy Ordinance (Cap 6) with the person's creditors, in either case without paying the creditors in full. (Amended 25 of 2003 s. 22)

(2) A person is also disqualified from being nominated as a candidate at an election if the person

has been found under the Mental Health Ordinance (Cap 136) to be incapable, by reason of mental incapacity, of managing and administering his or her property and affairs, but a person disqualified under this subsection is eligible for nomination as a candidate if, under that Ordinance, it is subsequently found that the person has become capable of managing and administering his or her property and affairs. (Replaced 25 of 2003 s. 22)

(2A) A person is also disqualified from being nominated as a candidate at a by-election if—

(a) within the 6 months ending on the date of the by-election—

(i) the person's resignation under section 14 as a Member took effect; or

(ii) the person was taken under section 13(3) to have resigned from office as a Member; and

(b) no general election was held after the relevant notice of resignation or notice of non-acceptance took effect. (Added 12 of 2012 s. 3)

(3) A person is also disqualified from being elected as a Member if the person has been found under the Mental Health Ordinance (Cap 136) to be incapable, by reason of mental incapacity, of managing and administering his or her property and affairs, but a person disqualified under this subsection ceases to be disqualified if, under that Ordinance, it is subsequently found that the person has become capable of managing and administering his or her property and affairs. (Replaced 25 of 2003 s. 22)

(4) A person is also disqualified from being elected as a Member for a functional constituency (other than the District Council (first) functional constituency and the District Council (second) functional constituency) if, since the close of nominations, the person has ceased to have a substantial connection with the constituency. (Amended 2 of 2011 s. 17)

(5) In this section-

**judicial officer** (司法人員) means the holder of a judicial office, as defined in section 2 of the Public Service Commission Ordinance (Cap 93);

**prescribed public officer** (訂明的公職人員) means any of the following-

(a) the Chairman of the Public Service Commission;

(b) the Commissioner and Deputy Commissioner of the Independent Commission Against Corruption and the holder of any other office under the Independent Commission Against Corruption Ordinance (Cap 204);

(c) The Ombudsman and the holder of any appointment under section 6 of The Ombudsman Ordinance (Cap 397);

(d) a member of the Electoral Affairs Commission;

(e) the chief executive of the Monetary Authority and any member of the senior management of that Authority, including divisional heads, executive directors, managers and counsel employed by that Authority;

(ea) the Privacy Commissioner for Personal Data and any person employed or engaged by him or her under the Personal Data (Privacy) Ordinance (Cap 486); (Added 48 of 1999 s. 24)

(eb) the Chairperson of the Equal Opportunities Commission and any person employed or whose services are engaged by the Commission under the Sex Discrimination Ordinance (Cap 480); (Added 48 of 1999 s. 24)

(f) any person holding an office, whether permanent or temporary, in a Government department or bureau and employed in the department or bureau.

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

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

- (a) to maintain that any person serving a sentence of imprisonment be disqualified from being nominated as a candidate at a Legislative Council ("LegCo") election and from being elected as a LegCo Member;
- (b) to provide for a specific regime in the electoral laws in respect of disqualification (or not) for election-related purposes concerning a person pending appeal, as follows -
  - (i) to allow an appellant who is released on bail pending appeal, regardless of the court of conviction or appeal, to be nominated as a candidate at a LegCo election and be elected as a LegCo Member until disposal of the appeal, so long as he or she remains on bail and is not otherwise caught by other restrictions under section 39 of the Legislative Council Ordinance (Cap. 542) ("LCO");
  - (ii) to disqualify an appellant who is currently serving a sentence of imprisonment from being nominated as a candidate at a LegCo election and from being elected as a LegCo Member, unless and until the person is subsequently granted bail pending appeal; and
  - (iii) to treat an appellant who may be disqualified under other provisions of section 39 of LCO in relation to a conviction and/or sentence similarly as a person under (i) above, so long as the person is not serving a sentence of imprisonment<sup>1</sup> ;
- (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;

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<sup>1</sup> Except an escaped convict

- (d) a possible need to disqualify a person who is serving detention in or who has escaped from Detention Centres, Training Centres, Drug Addiction Treatment Centres, Rehabilitation Centres or a Correctional Services Department Psychiatric Centre from being nominated as a candidate at a LegCo election and from being elected as a LegCo Member;
- (e) to allow a convicted person who is released under supervision<sup>2</sup> to be nominated as a candidate at a LegCo election and be elected as a LegCo Member, so long as he or she remains subject to the full rigours of the supervision regime and conditions, is not recalled to prison or the relevant alternative penal establishments and is not otherwise caught by other restrictions under section 39 of the LCO;
- (f) not to apply the recommendation in (e) above to a person released under supervision pursuant to a conditional release order made under section 15(1)(b) of the Long-term Prison Sentences Review Ordinance (Cap. 524);
- (g) to disqualify a person who has been granted leave of absence by the Commissioner of Correctional Services of Hong Kong pursuant to rule 17 of the Prison Rules (Cap. 234A) from being nominated as a candidate at a LegCo election and from being elected as a LegCo Member;
- (h) to make corresponding changes to relevant provisions in the District Councils Ordinance (Cap. 547) (“DCO”) and the Rural Representative Election Ordinance (Cap. 576) (“RREO”) on disqualifying persons from being nominated as a candidate and from being elected, having regard to changes from paragraphs 3.04 to 4.10 of the Consultation Paper; and
- (i) to make changes in the DCO and RREO to make it clear that a District Council member/Rural Representative who was previously disqualified from holding office on conviction of certain offences and/or sentenced to imprisonment as mentioned in paragraph 4.14 of the Consultation Paper will be disqualified from being nominated as a candidate or being elected for five years after the date of conviction (according to section 21(1)(e) of the DCO or section 23(1)(e) of the RREO).

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<sup>2</sup> Pursuant to section 7(1) or (2) of the Prisoners (Release under Supervision) Ordinance (Cap. 325), section 6(1) of the Post-Release Supervision of Prisoners Ordinance (Cap. 475), section 15(1)(c) of the Long-term Prison Sentences Review Ordinance (Cap. 524), section 5(1) of the Training Centres Ordinance (Cap. 280), section 5(1) of the Detention Centres Ordinance (Cap. 239), section 5 of the Drug Addiction Treatment Centres Ordinance (Cap. 244) and section 6(1) of the Rehabilitation Centres Ordinance (Cap. 567).

## Appendix III

### Relevant documents on Consultation report on disqualification of candidates with unserved prison sentences and other related matters

<b>Committee</b>	<b>Date of meeting</b>	<b>Paper</b>
Panel on Constitutional Affairs	21 July 2014 (Item IV)	<a href="#">Agenda</a> <a href="#">Minutes</a>
	20 October 2014 (Item IV)	<a href="#">Agenda</a>

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