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Chapter One: Background

- 1.01 The purpose of this consultation is to obtain public views on the disqualification of persons with unserved prison sentences as candidates at a Legislative Council (“LegCo”) election and other related matters.

Legislative Council Ordinance

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

Two Court of First Instance Cases

- 1.03 A member of the public and a serving LegCo Member were convicted and sentenced to 14 days’ and two months’ imprisonment respectively in the Magistrates’ Courts (“MC”) in early 2012. They each lodged an appeal against the conviction and sentence, and was granted bail pending appeal.
- 1.04 Both of them intended to stand for the 2012 LegCo election to be held in September 2012, and considered that the appeals were unlikely to be heard before the nomination period of the election. In anticipation that they would be disqualified from being nominated as a candidate and from being elected as a LegCo Member in accordance with section 39(1)(b) or section 39(1)(d) of the LCO, they each applied for leave to apply for judicial review against section 39(1)(b)(i) and section 39(1)(d) of the LCO in April 2012¹.

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

- 1.05 On 21 June 2012, the Court of First Instance (“the CFI”) handed down its written judgment (“the Judgment”)² that section 39(1)(b) of the LCO was inconsistent with Articles 26 and 39 of the Basic Law as well as Article 21 of the Hong Kong Bill of Rights (“HKBOR”)³. The CFI commented, but made no ruling, on the constitutionality of section 39(1)(d) of the LCO.
- 1.06 Section 39(1)(b) and section 39(1)(d) of the LCO specifically relate to disqualification of a person with an unserved sentence of death or imprisonment and a person serving a sentence of imprisonment respectively. These parts of section 39 are extracted below for reference -

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

...

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

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

(ii) received a free pardon; or

...

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

² The full version of the CFI’s judgments (English version only) can be found at the following link: http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=82353&QS=%2B&TP=JU.

³ Article 26 of the Basic Law provides that permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for election in accordance with law.

Article 39(1) of the Basic Law provides that the provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region, and Article 39(2) provides that the rights and freedom enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of Article 39(1).

Article 21 of the HKBOR provides that every permanent resident shall have the right and the opportunity, without any of the distinctions mentioned in Article 1(1) and without unreasonable restrictions - (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) to have access, on general terms of equality, to public service in Hong Kong.

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

Need for Public Consultation

- 1.08 The Administration has conducted the review, and sets out its considerations and recommendations in this paper.
- 1.09 The Administration wishes to solicit views from the public, and will decide the next step in the light of the views received.

Chapter Two: Objectives for Imposing Restrictions on the Right to be Nominated as a Candidate and be Elected as a Member

- 2.01 In different jurisdictions, it is not uncommon that restrictions are imposed by law to restrict a person from being nominated to stand for election, from being elected to take up a public office, or from continuing to hold a public office. Such restrictions are often linked to, among other things, whether a person has been convicted, sentenced to serve a term of imprisonment, and/or is serving a term of imprisonment.
- 2.02 In the case of the LegCo, section 39(1) of the LCO sets out the circumstances in which a person is disqualified from being nominated as a candidate at a LegCo election; and from being elected as a LegCo Member. In addition, Article 79 of the Basic Law sets out the circumstances in which a LegCo Member is declared no longer qualified for the office; and Article 79(6) concerns the case where a LegCo Member is convicted and sentenced to imprisonment for one month or more for a criminal offence.
- 2.03 Candidate disqualification requirements are restrictions on a person's right to stand for election, which right is constitutionally protected under Article 26 of the Basic Law and Article 21 of the HKBOR. As recognised by the CFI, such right is not absolute and can be subject to reasonable and justifiable restrictions which satisfy the proportionality test (i.e. if the restrictions pursue legitimate aim(s), are rationally connected and are proportionate to such aim(s))⁴. The reasonableness of the design features of the electoral system, including candidate disqualification requirements, should also be considered in light of the historical and political development of a place⁵. Besides, the right to stand

⁴ The CFI recognised that the criteria for eligibility to stand for election could be considerably stricter than those for voting, but the criteria restricting the right to stand for election must still be subject to the proportionality test. See paragraph 29 of the Judgment of HCAL 51/2012 and HCAL 54/2012.

⁵ In this regard, the legislative history of the relevant disqualification provisions before section 39 of the LCO can be found at paragraphs 36 to 65 of the Judgment.

for election is also subject to the exception in section 9 of the Hong Kong Bill of Rights Ordinance (Cap. 383)⁶.

2.04 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 following objectives that the disqualification provisions in the legislative regime aim to serve, which are also recognised by the CFI as legitimate aims, remain valid -

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

2.05 Our considerations are set out below.

Maintaining Public Confidence in the LegCo

2.06 In view of the important functions and powers of the LegCo as prescribed by the Basic Law⁷ and hence the responsibilities associated with being a LegCo Member, it is necessary to maintain public trust and confidence in the LegCo and the character, honesty and personal integrity of its Members who discharge those functions and exercise those powers.

2.07 Generally speaking, the imposition of a prison term (as opposed to other non-custodial sentences) is indicative of the culpability of the offender and the seriousness of the offending conduct. There are 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. There is therefore an argument that if a person has been sentenced to imprisonment by a court of law, he or she should not be regarded as a suitable

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 restrictions as may from time to time be authorised by law for the preservation of custodial discipline.

⁷ Article 73 sets out the powers and functions of LegCo. These include, among others, enacting laws, approving budgets, taxation and public expenditure, receiving and debating the policy addresses of the Chief Executive, raising questions on the work of the Government, debating issues concerning public interests, endorsing the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court, and receiving and handling complaints from Hong Kong residents.

candidate for an important public office at least until the sentence has been fully served⁸. The concern for upholding public confidence in the integrity of the LegCo Members/candidates may be particularly strong as regards a person who has been convicted of certain offences which, by their nature, cast serious questions over the credibility and integrity of the person in question⁹.

Ensuring Proper Operation of LegCo

- 2.08 If a person is serving a custodial sentence, his or her liberty is severely restricted and strictly regulated in accordance with the laws of Hong Kong, including the Prisons Ordinance (Cap. 234) and the Prison Rules (Cap. 234A). Daily routine of the respective institution is laid down for managing the activities of all prisoners. Every prisoner is under supervision of the staff of the Correctional Services Department (“CSD”).
- 2.09 Clearly an imprisoned person will not be able to fully or effectively discharge his or her duties and responsibilities as a LegCo Member. Responsibilities already taken up by the convicted LegCo Member will not be effectively discharged or may need to be undertaken by another Member. Meanwhile, his or her constituents will be unrepresented or under-represented during the period when the elected Member is imprisoned.
- 2.10 One may argue that an imprisoned person could be allowed timeout from imprisonment, as well as frequent visits and other forms of outside contacts, for the purpose of conducting election campaigns or carrying out his or her duties and functions as a LegCo Member. However, doing so would undermine, if not impair, the essence and defeat the purpose of a custodial sentence, and adversely affect the public interest in the integrity and effectiveness of our criminal justice system. This would also give rise to operational, logistics, manpower resource and security problems. Moreover, this would put the concerned election candidates (and elected Members) in a privileged position as compared to other prisoners in custody and give rise to an issue of

⁸ This concern is reflected in the current section 39(1)(d) of the LCO which disqualifies any person who is serving a sentence of imprisonment on the date of nomination or of the election.

⁹ Section 39(1)(e)(ii), (iii) and (iv) of the LCO disqualifies a person who was within the last five years convicted of offences related to corrupt or illegal conduct or bribery or election-related offences.

equality to the detriment of penal institution management. There is also concern that the system may be open to abuse.

Maintaining Public Confidence in the Electoral Process

2.11 The electoral process should not be subject to too much uncertainty lest electors be confused, the electoral process be discredited and legal and administrative burden be imposed on the election authorities. There is a concern that allowing a person who has not fully served his or her sentence to be qualified for election could give rise to uncertainty in the electoral process because if the person is imprisoned subsequently, he or she will become disqualified as a candidate, or, if elected, may have to vacate his or her seat.

Chapter Three: Considerations and Recommendations

- 3.01 In the Judgment, when considering the constitutionality of section 39(1)(b) of the LCO, the CFI appeared to have been primarily concerned with the specific circumstances of the applicants of the judicial review applications in question¹⁰, namely persons who have been sentenced to a term of imprisonment of less than three months and are on bail pending appeal against a conviction and sentence by an MC.
- 3.02 On this understanding, whilst the CFI struck down section 39(1)(b) of the LCO as a whole, the Administration is of the view that the CFI's ruling leaves open for argument that the disqualification of persons with unserved sentences but not in exactly the same circumstances of the applicants of the judicial reviews in question may still be justifiable.
- 3.03 It is also noteworthy that the CFI made no ruling on the constitutionality of section 39(1)(d) of the LCO which restricts a person serving a sentence of imprisonment from standing for a LegCo election, and only made some comments on the questions to be addressed in the assessment of the overall reasonableness of that section¹¹. Having considered these questions and reviewed the objectives and arguments set out in Chapter Two above, the Administration considers that the justifications underpinning the long-established section 39(1)(d) of the LCO remain sound and valid.

Persons on Bail Pending Appeal

- 3.04 As explained in paragraph 3.01 above, the Judgment was primarily concerned with a person who has been convicted and sentenced to imprisonment but is on bail pending appeal.

¹⁰ HCAL 51/2012 and HCAL 54/2012

¹¹ Whilst the CFI noted that section 39(1)(d) might catch those serving a short prison sentence who would be released by the time the new term of office of LegCo membership commences, it also recognised that a number of questions have to be addressed in the assessment of the overall reasonableness of section 39(1)(d), such as whether a candidate serving a prison sentence should be allowed timeout from imprisonment to conduct campaign (arguably the right to stand for election carries with it the right to a fair opportunity to conduct a campaign), whether this question has been considered in other jurisdictions, how this should be balanced against the public interest in the effectiveness of our criminal justice system in terms of punishment by prison sentence, how about security issues if such a candidate is allowed to have timeout, etc.

- 3.05 It is worth noting that a person convicted and sentenced to imprisonment is a person who has been found guilty of the offence. Even though the person may subsequently appeal against the conviction and/or sentence and be released on bail pending appeal, he or she remains guilty of the offence unless and until the conviction is overturned on appeal. Presumption of innocence does not apply to the appellant. Moreover, a person granted bail pending appeal is liable to be imprisoned if his or her conviction and/or sentence is upheld upon appeal. There may be a concern that allowing such person to stand for election could give rise to uncertainty in the electoral process because if the person's appeal is dismissed, he or she will subsequently become disqualified as a candidate.
- 3.06 However, we have also considered the aforementioned Judgment, and the fact that the courts, when considering whether or not to grant bail pending appeal, will consider, among other things, the likelihood of the appeal being allowed¹². Besides, unlike a person serving a sentence of imprisonment (including one who is not granted bail pending appeal and is required to serve the sentence of imprisonment whilst appealing), a person on bail pending appeal is not subject to custodial discipline and his or her liberty is not severely restricted. On balance, the Administration considers that there may be a case to allow a person on bail pending appeal to stand for election, so long as he or she is not otherwise caught by other restrictions under section 39 of the LCO.
- 3.07 At present, there is no relevant specific provision under the existing electoral laws suspending disqualification from candidature or office pending an appeal. On the other hand, there is a general provision in Rule 29 of the Criminal Appeal Rules ("Rule 29") (Cap. 221A) which stipulates that -

"Where upon conviction of any person of any offence any disqualification, forfeiture or disability attaches to him by reason of such conviction, such disqualification, forfeiture or disability shall not attach for the period of 10 days from the date of conviction, nor, in the event of an appeal, until the determination thereof by the Court of Appeal."

¹² Please refer to section 83Z of the Criminal Procedure Ordinance (Cap. 221) and the case of *HKSAR v Mohamed Rahoof Mohamed Sajahan*, HCMA 270/2014.

- 3.08 However, whilst Rule 29 applies to appeals lodged from the District Court or the CFI to the Court of Appeal, it does not apply to appeals lodged from MC to the CFI, or appeals lodged to the Court of Final Appeal. This explains why disqualification was not suspended for the applicants of the aforementioned judicial reviews.
- 3.09 Moreover, Rule 29 is not specifically tailored for application to electoral laws and provisions. It has not taken into consideration the special issues and problems which its application to the electoral regime would entail (such as those discussed in paragraphs 2.08 to 2.10 above). We therefore propose not to apply Rule 29 to the electoral laws.
- 3.10 Instead, we consider it desirable to provide for a specific regime in the electoral laws in respect of disqualification (or not) for election-related purposes concerning a person pending appeal, as follows -
- (a) the Administration proposes that an appellant who is released on bail pending appeal, regardless of the court of conviction or appeal, be allowed to be nominated as a candidate at a LegCo election and be elected as a LegCo Member until disposal of the appeal, so long as he or she remains on bail and is not otherwise caught by other restrictions under section 39 of the LCO;
 - (b) for an appellant who is currently serving a sentence of imprisonment, in view of the considerations set out in Chapter Two and paragraphs 3.06 and 3.09 above, the Administration proposes that such a person should be disqualified from being nominated as a candidate at a LegCo election and from being elected as a LegCo Member, unless and until the person is subsequently granted bail pending appeal; and
 - (c) for an appellant who is convicted but is not serving a sentence of imprisonment (e.g. in case of suspended sentence, on early release under supervision), his or her position is similar to that of paragraph 3.10(a) above, with his or her liberty not severely restricted. Such a person may however be disqualified under other provisions of section 39 of the LCO in relation to the conviction and/or sentence, e.g.

section 39(1)(e). The Administration proposes that such a person should be treated similarly as a person under paragraph 3.10(a) above; nevertheless, we propose that this treatment should not apply to an escaped convict (see paragraph 3.13 below as well).

Escaped Convicts

- 3.11 The original section 39(1)(b) of the LCO also covered escaped convicts.
- 3.12 For the purposes of this document, an “escaped convict” means a person who has been convicted of an offence and sentenced to death or imprisonment but has absconded¹³ and is unlawfully at large.
- 3.13 A convicted person who escapes justice has not only contravened the law through the initial criminal conduct, but has also evaded the penalty imposed on him or her by a court of law, or has otherwise absconded in breach of the terms and conditions of release, contrary to the confidence and trust placed in him or her. Therefore, the Administration proposes that all escaped convicts be disqualified from being nominated as a candidate at a LegCo election and being elected as a LegCo Member. Even though the chances of an escaped convict standing for election may arguably be small¹⁴, the Administration considers it reasonable as a matter of principle to restrict an escaped convict from standing for election, irrespective of the gravity of his or her offence and punishment or whether he or she is waiting for the determination of an appeal.

¹³ This may include a prisoner who has escaped from prison or an offender who has escaped from the alternative penal establishments as elaborated in paragraphs 4.02 to 4.05 below, a person released on bail pending appeal who has jumped bail, and a person who is released before formal discharge from prison and who has absconded.

¹⁴ The CFI commented 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.

Chapter Four: Related Issues

Clarification on the Qualification of Certain Categories of Persons

4.01 In reviewing the relevant disqualification provisions, we consider it necessary to take the opportunity to clarify the qualification of certain categories of persons, as elaborated in paragraphs 4.02 to 4.09 below.

(A) *Persons Detained in Detention Centres, Training Centres, Drug Addiction Treatment Centres, Rehabilitation Centres or a CSD Psychiatric Centre*

4.02 At present, besides being sentenced to detention in a prison, a person convicted of an offence may be detained in alternative penal establishments under the supervision of CSD, namely Detention Centres, Training Centres, Drug Addiction Treatment Centres, Rehabilitation Centres and a CSD Psychiatric Centre.

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

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

4.05 A person may also be ordered to be detained in a CSD Psychiatric Centre which is set apart as a prison pursuant to section 4 of the Prisons Ordinance (Cap. 234) (i.e. Siu Lam Psychiatric Centre) in

relation to an offence. Similarly, it is considered important that a person closely follows and abides by the relevant rules and regulations so that he or she may rehabilitate during his or her custody in the CSD Psychiatric Centre. Hence, the Administration also considers that there may be a need for clarification in the law that a person ordered to be detained in a CSD Psychiatric Centre, and a person who has escaped from a CSD Psychiatric Centre are disqualified from being nominated as candidates at a LegCo election and from being elected as LegCo Members.

(B) *Prisoners Who are Subject to Early Release under Supervision*

- 4.06 Prisoners who are subject to early release under supervision¹⁵ are so released to facilitate their rehabilitation and reintegration into society. Such persons are, from a legal point of view, persons who have not fully served their sentence. There are views that such persons should not be allowed to stand for election because these persons are subject to supervision conditions set out in the relevant supervision order, such as residing at a half-way house during specified hours, restriction on employment, association, etc. Should they be in breach of any of the conditions, they are liable to be recalled to prison, and in some cases liable to be prosecuted for an offence, and if that happens, this would give rise to uncertainty in the electoral process.
- 4.07 On the other hand, generally speaking, persons subject to early release under supervision will not be remanded in custody unless they act contrary to the terms and conditions of the supervision order, hence they are capable of preventing their own re-imprisonment. Upon the expiration or discharge of the supervision order, such persons would be treated as having completed their sentence and would not be taken into prison custody. Moreover, in contrast to persons who are serving a custodial sentence and whose liberty is severely restricted, persons who are released under supervision are subject to relatively less severe restrictions on their personal liberty and are in a relatively better position to conduct election campaign or to discharge duties as a LegCo Member.

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

4.08 The Administration considers that it is highly important to maintain the integrity of the supervision regime (which is part of the offender's correctional services programme) and the supervision conditions that may be imposed on a person released under supervision and to ensure that they apply and remain fully complied with by the person in question. On the other hand, so long as these supervision conditions continue to prevail and be complied with, and there is no obligation to relax or undermine these conditions to facilitate a candidate at an election to conduct election campaign or to discharge his or her duties as a LegCo Member, the Administration is inclined not to disqualify a convicted person who is released under supervision¹⁶ from being nominated as a candidate at a LegCo election or from being elected as a LegCo Member on ground that he or she still has an unserved sentence, so long as such a person is not recalled to prison or the relevant alternative penal establishments or otherwise caught by other restrictions under section 39 of the LCO.

4.09 For the avoidance of doubt, the Administration considers that a person who has been conditionally released under supervision pursuant to a conditional release order made under section 15(1)(b) of the Long-term Prison Sentences Review Ordinance (Cap. 524) should be taken to be serving the sentence within the meaning of section 39(1)(d) of the LCO under the existing legislation¹⁷ and hence should be disqualified from being nominated as a candidate at a LegCo election or from being elected as a LegCo Member. Generally speaking, a conditional release order applies to a person sentenced to life imprisonment. The purpose of the conditional release is to enable him or her to be released under supervision to facilitate the Long-term Prison Sentences Review Board to consider whether to recommend the Chief Executive to convert his or her sentence from an indeterminate sentence to a determinate sentence. Even if the sentence is eventually converted, the person is unlikely to be immediately discharged.

¹⁶ Including also those released under supervision pursuant to section 5(1) of the Training Centres Ordinance (Cap. 280), section 5(1) of the Detention Centres Ordinance (Cap. 239), section 5 of the Drug Addiction Treatment Centres Ordinance (Cap. 244) and section 6(1) of the Rehabilitation Centres Ordinance (Cap. 567).

¹⁷ Section 19(4) of the Long-term Prison Sentences Review Ordinance (Cap. 524) provides that a person released under a conditional release order is taken to be serving the sentence, and section 27 of the Ordinance provides that any period under which a person is released under a conditional release order is taken to be a part of the sentence being served by the prisoner.

Instead, he or she will usually be subject to early release under supervision pursuant to an order made under section 15(1)(c) of that Ordinance. Therefore, a person released pursuant to a conditional release order under section 15(1)(b) of the Ordinance is in a different position from other prisoners on early release under supervision pursuant to the schemes mentioned in footnote 15 to paragraph 4.06 above.

(C) *Prisoners Granted Leave of Absence*

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

Corresponding Amendments to other Electoral Laws

- 4.11 Provisions similar to those in the LCO can be found in other related electoral legislation, such as the Chief Executive Election Ordinance (Cap. 569) (“CEEEO”) (covering the elections of both the Chief Executive and the Election Committee)¹⁸, the District Councils Ordinance (Cap. 547) (“DCO”) and the Rural Representative Election Ordinance (Cap. 576) (“RREO”). Having regard to the considerations and proposals in Chapters Three and Four above, the Administration proposes making corresponding changes to relevant provisions in the DCO and the RREO on disqualifying persons from being nominated as a candidate and from being elected.
- 4.12 Whilst the circumstances in which a LegCo Member is disqualified from holding office are dealt with under Article 79 of the Basic Law, disqualification of a District Council (“DC”) member/a Rural Representative from holding office is not

¹⁸ The Administration proposes not making corresponding changes to the disqualification provisions in the CEEEO at this stage pending a later amendment exercise to introduce the electoral arrangements for the 2017 Chief Executive election.

governed by the Basic Law but specific provisions in the DCO/RREO that are similar to section 39 of LCO. We will consider necessary amendments to the provisions regarding disqualification from holding office with reference to the way forward for the disqualification from standing for election.

A Legal Uncertainty Relating to Disqualification of Former DC Members and Rural Representatives

- 4.13 At present, section 21(1)(e) of the DCO stipulates that a person is disqualified from being nominated as a candidate at an election and from being elected as an elected member if the person, where the election is to be held or is held within five years after the date of the person's conviction, is or has been convicted of an offence and sentenced to imprisonment for a term exceeding three months or convicted of some specified types of offences. This provision applies to all persons no matter whether they are former DC members or not.
- 4.14 Separately, section 24(1)(d) of the DCO stipulates that a DC member who is convicted of an offence and sentenced to imprisonment for a term exceeding three months or convicted of some specified types of offences (the same as those in section 21(1)(e) of DCO) after being elected is disqualified from holding office. It is further stipulated in section 24(2) of the DCO that section 24(1)(d) “does not prevent a person from being eligible to be a candidate at an election to be held five years after the disqualification [from holding office]”. It can therefore be interpreted to mean that former DC members who were disqualified from holding office under section 24(1)(d) are disqualified from standing for election within five years after the actual date of disqualification.
- 4.15 There is legal uncertainty as to whether a DC member who was previously disqualified from holding office on conviction of certain offences and/or sentenced to imprisonment as mentioned in paragraph 4.14 above should be disqualified from standing for election for five years counting from the date of conviction (according to section 21(1)(e) of the DCO) or the date of actual disqualification (according to section 24(2) of the DCO).

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

Chapter Five: Summary of Recommendations and Views Sought

Recommendations and Views Sought

5.01 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 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 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 imprisonment¹⁹;
- (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;

¹⁹ 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 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 (as detailed in footnote 15 to paragraph 4.06 and footnote 16 to paragraph 4.08 above) 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 DCO and the 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 above; and
- (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 as mentioned in paragraph 4.14 above 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).

5.02 We welcome views from the public on the above initial recommendations and other views on this issue.

Ways of Providing Views and Comments

- 5.03 Please send us your views by mail, facsimile or email on or before **30 September 2014** -

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

Fax number: 2840 1976

E-mail address: disqualification_consultation@cmab.gov.hk

- 5.04 It is voluntary for members of the public to supply their personal data upon providing views on this consultation paper. The submissions and personal data collected may be transferred to the relevant Government bureaux and departments for purposes directly related to this consultation exercise. The Government bureaux and departments receiving the data may only use the data for such purposes.
- 5.05 The names and views of individuals and organisations who/which put forth submissions in response to this consultation paper (“senders”) may be published for public viewing. We may, either in discussion with others, whether privately or publicly, or in any subsequent report, cite comments submitted in response to this consultation paper.
- 5.06 To safeguard senders’ data privacy, we will remove senders’ relevant data, such as residential/return addresses, email addresses, identity card numbers, telephone numbers, facsimile numbers and signatures, where provided, when publishing their submissions.
- 5.07 We will respect the wish of senders to remain anonymous and/or keep the views confidential in part or in whole. If the senders request anonymity in the submissions, their names will be removed when publishing their views. If the senders request confidentiality, their submissions will not be published.

5.08 If the senders do not request anonymity or confidentiality in the submissions, it will be assumed that the senders can be named and the views can be published in their entirety.

5.09 Any sender providing personal data to this Bureau in the submission will have rights of access and correction with respect to such personal data. Any requests for data access and correction of personal data should be made in writing to -

Address: Assistant Secretary (2A)
Constitutional and Mainland Affairs Bureau
12/F, East Wing
Central Government Offices
Tamar
Hong Kong

Fax number: 2840 1976

Email Address: disqualification_consultation@cmab.gov.hk

Annex

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

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

(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.