

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