



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 LegCo³, 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.

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