

The Professional Commons

Written Submissions to the Legislative Council Bills Committee on West Kowloon Cultural District Authority Bill

“On the Question of the Composition and Appointment System of the Board of the West Kowloon Cultural District Authority”

Introduction

1. The Professional Commons recognises and agrees that the Government’s existing policy on arts and cultural development must have the predominant aim to create an environment that is conducive to the freedom of artistic expression and creation, and to enhance *“wider public participation in cultural activities.”*¹
2. The emphasis on wider public participation and the need to be in line with the principles of *“Community-driven”* and *“People-oriented”* is a constant theme repeated throughout the Government’s existing policy on the development of the West Kowloon Cultural District (**“WKCD”**)².
3. The Professional Commons believes that in order to fulfil the aims and principles as set out by the Government, and to allow the public community in Hong Kong to have maximum involvement in the WKCD and its ongoing development, the process must begin with the design and composition of the Board of WKCD Authority (**“WKCDA”**).

¹ Legislative Council Brief, Home Affairs Bureau, 31 January 2008, para. 2

² Ibid, para. 6

4. The paper will focus on this critical issue and comment on the existing structure of the WKCDA Bill (the “**Bill**”) with regards to the design and composition of the Board of WKCDA.

The Board of WKCDA – Composition by Appointments

5. Under the existing structure of the Bill, the Board of the WKCDA (the “**Board**”) will be vested with a wide range of functions and powers covering issues from the development of land, financial management of art and cultural projects, the management of cultural facilities, the development of cultural and creative industries to the nurturing of local artists and groups³.
6. This is a heavy responsibility and one that could only be properly discharged if members of the Board are to be drawn from a wide range of backgrounds and disciplines. The Government must therefore ensure that members of the Board will be selected from the widest and most diversified pool of candidates possible – consisting of academics, professionals, individuals from local arts and cultural groups, experts (both international and local) on the management of cultural projects, and other members of public.
7. Section 6 of the Bill set outs the mechanism for the establishment and composition of the Board. It states that *all* board members are to be appointed by the Chief Executive and that at least 5 members must be persons who “*in the opinion of the Chief Executive*” have knowledge of or experience in or exposure to arts and cultural activities.
8. Apart from stating that all appointments would be made by the Chief Executive, and that 5 of whom must be (in the Chief Executive’s opinion) arts and cultural experts, the Bill provides for no other statutory guidelines for the selection of members.
9. The Professional Commons is deeply concerned with the proposed appointment process.

³ Ibid, para. 8 to 10

10. The Bill does not set out or define any selection criteria or independent mechanism for the appointment of members of the Board. The Chief Executive is given sole unfettered discretion to select and appoint members. The proposed appointment process and its criteria (if any) are vague and ill-transparent.
11. Most importantly, the Bill does not set out any mechanism in which to enable and facilitate the Chief Executive to make the decision on appointments based on well-informed sources and appropriate recommendations. One cannot assume that the Chief Executive would be equipped with the requisite information and expertise upon which to make his decision.
12. One must recognise that arts and cultural activities and the artistic values which they carry may often be subjective and difficult to measure by objective standards. To allow the Chief Executive to decide who in *'his opinion'* is an expert on arts and culture would most likely produce arbitrary appointments which does not reflect the general sentiments and needs of the local arts and cultural community and the public.
13. Given the importance of the WKCD and the role it will play in driving the development of the local arts and cultural scene, to rely solely on the discretion of the Chief Executive to make decisions on appointments to the Board, based on uncertain and unspecified guidelines and criteria, is in direct contravention of the principle of 'governance in accordance with law' and ignores the need for open government.
14. Arbitrary decisions by the Executive that are not based on clear and certain guidelines and criteria are opened to challenge by way of judicial review.

Alternative Proposals

15. In order to address the above concerns, The Professional Commons has studied examples in other countries so as to analyse the composition and appointment system of similar bodies in the arts and cultural field.

Overseas Experience – An Open System of Nomination and Appointment

16. We have studied the appointment systems of various overseas bodies and organisations in the field of arts and cultural development playing a similar role to that envisaged for the WKCDA⁴. One common feature in all the examples which we have looked at is their allowance for an open nomination process for any individual member of the public to be appointed to its board (or executive council) to serve as either full-time or part-time members.
17. For bodies/organisation of this kind, there is often in place an open application process where any member of the public, who is interested in being nominated for membership of a board or governing body, are invited to apply to be considered for the position.
18. The appointment system is co-ordinated through an established application process, open to all members of the public community, with clear guidelines set out for the:
 - i. screening of candidates;
 - ii. interview; and
 - iii. selection criteria of candidates.

⁴ The Australia Council for the Arts

'Creative New Zealand' – Arts Council of New Zealand

Canada Council for the Arts

Arts Council of England

19. In England, appointments to the Art Council are made by the Minister for Culture. The appointment process is regulated by a code of practice which governs all ministerial appointments to public bodies⁵. The code of practice emphasizes on the need for ministers to observe the following overriding principles when it comes to the appointments for public bodies:

- **Merit**

All public appointments should be governed by the overriding principle of selection based on merit, by the well-informed choice of individuals who through their abilities, experience and qualities match the need of the public body in question.

- **Independent scrutiny**

No appointment will take place without first being scrutinised by an independent panel or by a group including membership independent of the department filling the post.

- **Probity**

Board members of public bodies must be committed to the principles and values of public service and perform their duties with integrity.

- **Openness and transparency**

The principles of open government must be applied to the appointments process, its working must be transparent and information provided about the appointments made.

20. Appointment based on the merit of an individual candidate must obviously be the most important criteria in the process. It cannot be stressed more that all appointments should

⁵ The Commissioner for Public Appointments - Code of Practice for Ministerial Appointments to Public Bodies August 2005 (a copy of the Code of Practice could be located at: www.ocpa.gov.uk/upload/assets/www.ocpa.gov.uk/codeofpractice.pdf)

be made on merit, and political activity or patronage must play no part in the selection process.

21. The selection criteria adopted by the New Zealand Government for its Arts Council includes the following:
 - the board must consist of members with a broad range of skills and experience
 - the need for intimate knowledge of professional arts and arts in the community
 - expertise on management, financial or other specialist skills
 - culturally diverse backgrounds
 - experience of rural and urban environments

22. It must be emphasised that these selection criteria are made known to all applicants and the public, therefore, there is no question of the selection criteria being changed or openly manipulated after the selection process has commenced.

23. An independent panel charged with the duty to oversee the entire selection process underwrites the integrity of the whole appointments process. All candidates and his or her application must first be submitted to the independent panel for review and assessment before a recommendation can be made to the minister or government official who is charged with the statutory power to make the appointments.

24. The composition of the independent panel is usually consisted of key stakeholders in the arts and cultural community and members of the public coming from a diversified background.

The Board of WKCDA

25. In order to ensure that the WKCDA will be a truly “*Community-driven*” and “*People-oriented*” organisation as the Government has intended and in accordance with the recommendation of the Consultative Committee on the Core Arts and Cultural Facilities of the WKCD for the “*setting up of the WKCD Authority with wide representation from different sectors*”⁶, it is recommended that the Bill should set up an open and transparent appointments process that will be overseen by an independent panel with the adoption of clear and certain selection criteria.

‘Open to all’

26. The Bill must stipulate that any member of the public is eligible to apply or nominate a person other than himself/herself to become a member of the Board. This would maximise the pool of candidates from which the Government could choose from and ensure there will be the widest possible participation from different sectors of the public.

Independent Panel or Commission

27. The Bill should also provide for the set up of an independent panel or commission for the selection of members of the Board. Although we do not have established codes of practice governing the appointments to public bodies, this kind of independent panel or commission used for the selection and recommendation of candidates to the Chief Executive for appointment has been used in Hong Kong. The Judicial Officers Recommendation Commission is a very good example where applications are received by an independent panel for the purposes of making recommendations on judicial appointments to the Chief Executive⁷.

⁶ Recommendation Report of the Consultative Committee on the Core Arts and Cultural Facilities of the WKCD, Executive Summary, para. 4.29

⁷ Judicial Officers Recommendations Commission Ordinance Cap. 92 – where members of the legal profession (nominated by the Law Society and the Bar Association), Chief Justice, members of the Judiciary and other

28. There is no reason why a similar panel or commission could not be simultaneously built into the Bill as part of the appointments system.
29. The membership for the independent panel or commission should be drawn from key stakeholders in the arts and cultural community in Hong Kong. All registered arts and cultural groups⁸ in Hong Kong should be automatically be allocated a seat on the independent panel or commission, with the rest of the seats allocated to other members of the public from diversified backgrounds⁹. Since the appointments system must be as open and transparent as possible and that the WKCD project is aimed to be “*Community driven*” and “*People-oriented*”, any concern that the independent panel or commission might be too large is unfounded.
30. The independent panel or commission would be a great opportunity to engage the public in the process and give the local arts and cultural community and the Hong Kong people a say on how the WKCD ought to be managed and developed by selecting its executive body.
31. The advantage of having an independent panel or commission overseeing the appointments process is that any candidates selected for appointment would have the extra credibility and representativeness which a simple “*CE Appointed*” system does not have.
32. In order to ensure independence and fairness, members of the selection panel or commission must declare his or her interests and that all government officials and members of political parties should be excluded from the selection process.

members of public are invited to make joint recommendations to the Chief Executive for appointments to the Judiciary

⁸ Arts and cultural groups should be given a broad definition including all literary, film, fine arts, music, dance, and other performance arts.

⁹ Representatives should be selected from local communities within Hong Kong.

33. A Code of Practice (similar to that used in the UK) should be drawn up to govern the conduct and procedures of the selection process.
34. The Bill should also stipulate that the Chief Executive must, when exercising his or her power to make appointments under the Ordinance, follow the recommendation(s) made by the independent panel or commission.

Selection Criteria

35. We note the Government is concerned that since the needs for the WKCD and the composition of its Board may vary from time to time depending on which stage of development it is in, it is not appropriate to specify the precise composition of the Board members in the Bill¹⁰.
36. However, this does not preclude the need to set out the basic selection criteria and/or guidelines for members of the Board. Without a clearly established set of selection guidelines and/or criteria in place, any executive decision could be challenged by way of judicial review on the grounds that a decision is arbitrary and/or *Wednesbury* unreasonable.
37. We believe that basic selection criteria and/or guidelines should be adopted and set out in a Schedule annexed to the Bill. Experience could be drawn from the selection criteria adopted by the New Zealand Government as set out above.

Composition of the Board

38. We believe the membership should not be confined to 20 given the heavy duties and responsibilities that will be vested in the Board. A wider calibre of experience, knowledge and expertise is needed for the deliberation process and sharing of the heavy

¹⁰ Legislative Council Brief, Home Affairs Bureau, 31 January 2008, para. 12

workload. The feasibility of a system comprising of both full time and part-time members should be considered.

39. We do not object to having public officers appointed to the Board, however, the selection of a public officer(s) must go through the same application and selection process as the other candidates for the non-public officer memberships (i.e. independent scrutiny by the independent panel or commission as described above).
40. We believe the Chairman should not be a public officer and we can see no such need. The Chairman should be someone who is a prominent and respected figure from the local arts and cultural field and not a government official. The best way to decide on the choice of the Chairman is through an open nomination and appointment process conducted through an independent panel or commission. The Bill should expressly stipulate this.

Legislative Oversight

41. We support the idea of having an element of legislative oversight in the Board. However, instead of having at least one member of the Legislative Council to sit on the Board, the minimum requirement should be raised to two in order to reflect a wider political spectrum¹¹.
42. Members of the Legislative Council who are interested in being considered for appointment to the Board must be required to apply to the independent panel or commission and go through the formal selection process.

Summary of Recommendations

43. Set out below is a summary of the key recommendations made by The Professional Commons:

¹¹ See for example the National Council for Arts in the United States, with ex-officio members appointed by Congress from two major political parties.

- Open up the process of nomination and appointment of Board Members to ALL
- Establish an independent panel or commission for the selection and vetting of all candidates
- The independent panel or commission should include key stakeholders of the local arts and cultural community
- Adopt a Code of Practice governing the procedure and conduct of members of the independent panel or commission
- Establish clear guidelines and criteria for the selection of Board Members

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The Professional Commons