

Submission to Panel on Education, Legislative Council
Meeting on 9 Feb 2009

**Governance Structure and Grievance and
Complaint Mechanisms of the UGC-funded Institutions**

Academic Staff Association of The Hong Kong Institute of Education
9 Feb 2009

We reiterate our position in our submission to this Panel in July 2008. We attach the same for your easy reference. We provide the following supplement to our opinion in light of latest developments.

1. We refer to the letter of our Council Chairman Dr. Thomas Leung to your Panel Secretary dated 31 Dec 2008. We appreciate that Dr. Leung supports the call for a higher degree of public transparency in our Institute's governance. We also note that the Council did publicize the non-confidential items of its meeting agenda and relevant papers via the intranet.
2. On the other hand, we are concerned about the restrictions, mentioned in Dr. Leung's letter, on the disclosure of documents, namely, that such disclosure must not infringe: a. the need to respect personal data privacy and to observe confidentiality; b. the freedom of discussion at Council meetings; c. institutional autonomy. Such conditions may be abused in order to restrict important information in a way that goes against the principle of transparency. We call for a mechanism to discuss how to resolve different views on the actual application of the above three conditions. Whenever there is a dispute on whether certain documents fall within those three areas, the matter should be referred to a committee that includes at least one staff Council representative designed to solve the problem of document classification.
3. In addition to our recommendations set out in our said submission last July, we emphasize one point specific to our Institute: our staff members should have the right to elect staff representatives to the Council. At present, for administrative staff members, only those whose rank or grade is equivalent to that of full-time teaching staff would be eligible to take part in an election. Our Council had recently discussed the proposal to broaden the electorate to include all staff. The President Prof Anthony Cheung suggested that the Institute should find a way to allow junior staff members to participate in Staff Council Member elections. However, the Council decided that it is now not the appropriate time to take any action to amend the Ordinance owing to the possible conferment of a university title to the Institute. We long for re-titling but we cannot endure the deprivation of voting rights without any deadline. We therefore propose that the improvement to the Ordinance should be effected within the term of the current, Fourth Legislative Council, i.e. before 2012, at the latest.
4. As quite often mentioned, there exist different views between us and the senior management. Some may be resolved through our regular meetings. However, the following example is a typical issue that we fail to persuade our Institute to act on. At present, there is a standard clause in our employment contracts: "[t]he Institute may change any of your terms and conditions of employment at any time provided that no change shall be made which would retrospectively lower salary or allowances or reduce accrued benefits relating to service prior to the implementation of such changes." Such a clause enables our Institute to reduce our salary, allowances and benefits unilaterally without our consent. We are particularly worried about this clause in this financially difficult period. Our Institute cannot explain how this clause can be implemented. Our senior

management cannot give any reason of keeping such a clause except that the legal advice suggested that the Institute had better play safe by keeping it. Yet, staff members are very insecure in the face of this unequal stipulation. Though this clause may be void due to lack of certainty and may even violate the Employment Ordinance, it can easily be abused by the Institute and has a chilling effect of silencing the employees in their fight for labour rights. This reflects the unequal bargaining power between the Institute and the employees. We urge your Panel to call for the removal of such an unjust and unreasonable clause. This issue also shows that our recommendations on the governance structure, grievance and complaint mechanisms set out here and in our previous submission last July are urgent genuine pressing needs.

Leung Yan Wing, President,
Chong Yiu Kwong, Exco Member,
Academic Staff Association of The Hong Kong Institute of Education
9 Feb 2009

Submission to Panel on Education, Legislative Council
Special Meeting on 17 July 2008

**Governance Structure and Grievance and
Complaint Mechanisms of the UGC-funded Institutions**

Academic Staff Association of The Hong Kong Institute of Education
15 July 2008

Guiding Principles:

1. Governance of higher education must comply with the constitutional requirement set out in article 137 of the Basic Law:

“Educational institutions of all kinds may retain their autonomy and enjoy academic freedom.”¹

2. **“Institutional arrangements should be fair, just and equitable, and as transparent and participatory as possible.”²**
3. The “Lima Declaration on academic freedom and autonomy of institutions of higher education” (Lima Declaration)³, at its clause 19, states that

“The autonomy of institutions of higher education shall be exercised by democratic means of self-government, which includes active participation of all members of respective academic communities. All members of the academic communities shall have the right and opportunity, without discrimination of any kind, to take part in the conduct of academic and administrative affairs. All governing bodies of institutions of higher education shall be freely elected and shall comprise members of different sectors of the academic community. The autonomy should compass decisions regarding administration and determination of policies of education, research, extension work, allocation of resources and other related activities.”
(emphasis added)

4. Clause 10 of the Lima Declaration provides that:

¹ The Basic Law contains a stronger message than the corresponding provision in the Sino-British Joint Declaration (Annex I, article 10): “Institutions of all kinds, including those run by religious and community organizations, may retain their autonomy.”

² General Comment No. 13 of the United Nations Committee on Economic, Social and Cultural Rights (1999), paragraph 40. Accessed on 15 July 2008 at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.1999.10.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.1999.10.En?OpenDocument).

³ In September 1986, the World University Service requested a human rights expert Manfred Nowak to draft a declaration on academic freedom and higher education institutions’ autonomy. This Declaration was adopted at the General Assembly of the World University Service in September 1988. The text of the Lima Declaration may be found in many books, e.g. John Daniel (ed.) (1993) *Academic Freedom 2 : a human rights report*, London: Zed Books, Annex 1. For details on international laws and domestic laws on academic freedom and institutional autonomy, see Submission to Panel on Education, Legislative Council, Special Meeting on 13 April 2007 by Chong Yiu Kwong dated 12 April 2007.

“All institutions of higher education shall guarantee the participation of students in their governing bodies, individually or collectively, to express opinions on any national and international question.”

5. Clause 5 of the Lima Declaration stipulates that:

“All States and institutions of higher education shall guarantee a system of stable and secure employment for teachers and researchers. No members of the academic community shall be dismissed without a fair hearing before a democratically elected body of the academic community.”

6. The American Association of University Professors (AAUP) developed an assessment tool to evaluate shared governance. For example, regarding institutional communication, the question is “[d]oes consultation by the administration with faculty leadership allow time and a mechanism for leadership to consult with their constituents before offering recommendations?”⁴

Recommendations

Governance Structure: General

7. The Administration should draft a law to **implement articles 34, 39 and 137 of the Basic Law** in order to protect academic freedom and institutional autonomy. In order to operationalize the legal protection of academic freedom and institutional autonomy, a more concrete definition of academic freedom and provisions for its protection should be incorporated in the relevant ordinances.
8. **Linkages between universities and the Hong Kong Government should be reduced.** First, the Government should not have powers to direct any institution of higher education.⁵ Second, no public servants or officers should be members or observers of the governing bodies. Third, the number of government-appointed council members of higher education institutions should be reduced to a small minority. Fourth, the chairperson of the governing bodies can only be elected among its independent members. Fifth, the Chief Executive should no longer be the Chancellor of any institution of higher education.
9. Institutions of higher education should formally **adopt the Lima Declaration**⁶ and establish their own policy statements on academic freedom and institutional autonomy.

Governance Structure: The Hong Kong Institute of Education

10. In addition to the above recommendations, the following are the main comments and recommendations specific to the Hong Kong Institute of Education.
11. A government official shall not be the head of the Institute.⁷

⁴ See “Governance of Colleges and Universities”. Accessed on the AASP website on 16 Jun 2008 at <http://www.aaup.org/AAUP/issues/governance/>

⁵ Section 5 of the HKIEd Ordinance.

⁶ In 1994, the HKU Senate considered the Lima Declaration and noted that it was consistent with the university’s mission and goals. Professor Carole Petersen considered formal adoption of the Lima Declaration to be necessary. See Carole Petersen, (2000) “Preserving Academic freedom in Hong Kong: lessons from the Robert Chung Affair” in 30 *HKLJ* 165, endnote 34.

⁷ Under section 6(2) of The Hong Kong Institute of Education Ordinance, Cap. 444, “The Chief Executive shall be the Chancellor of the Institute.” Under section 6(1), the Chancellor of the Institute shall be the head of the Institute.

12. Any public officer shall not be a member or observer in the Council.⁸
13. Council members appointed by the Chief Executive should be reduced to a small minority.⁹
14. The Chair, Deputy Chair and the Treasurer of the Council shall be elected among its members and without restriction to those members possessing relevant experience in commerce, industry or a profession in Hong Kong.¹⁰
15. The Government shall not have the power to give directions to the Institute.¹¹
16. Staff members and students in the Council shall have the same power as the other Council members in the selection of President and Vice President.¹²
17. The President of the Students' Union shall be a student Council member .¹³

Grievance and Complaint Mechanisms: General

18. Since 1999, we have supported the idea of establishing an independent mechanism to handle grievances and appeals by staff of all UGC-funded institutions.
19. Institutions of higher education should set up their commissions to monitor the situation by conducting an academic freedom impact assessment on their policy and practice on a regular basis, advise their governing bodies and Senate on matters affecting academic freedom and institutional autonomy, and launch regular promotion programmes both on their campus and addressed to the public. A proper set of **general grievance procedure** and mechanism to deal with complaints on infringement of academic freedom should be in place in all the higher education institutions.¹⁴

⁸ Section 8(1)(c) of The Hong Kong Institute of Education Ordinance provides for “at least one but not more than 3 public officers appointed by the Chief Executive.”

⁹ According to section 8(1)(f) of The Hong Kong Institute of Education Ordinance, 14 Council members (who are neither public officers nor employees of the Institute) shall be appointed by the Chief Executive. Together with the public officers appointed by the Chief Executive, the outsiders become the majority of the Council of the Institute. This suggestion, like many others in this submission, has been put forward by our Association on previous occasions: see Written Submission on the LegCo Secretariat's Research Report on Academic Freedom and Institutional Autonomy of Higher Education in the UK, New Zealand and HK by Academic Staff Association of The Hong Kong Institute of Education dated 31 Dec 2007.

¹⁰ Section 8(2) of The Hong Kong Institute of Education Ordinance stipulates that the Chair, Deputy Chair and the Treasurer of the Council shall be appointed by the Chief Executive among Council members who have relevant experience in commerce, industry or a profession in Hong Kong.

¹¹ Under section 5, “(1) The Chief Executive in Council may give to the Institute directions with respect to the exercise of its powers or the achievement of its objects, either generally or in any particular case. (2) In the exercise of its powers and the achievement of its objects the Institute shall comply with any directions given by the Chief Executive in Council under subsection (1).”

¹² Section 11(7) of The Hong Kong Institute of Education Ordinance shall be repealed. It states that “A member of the Council appointed under section 8(1)(d) or (g) or elected under section 8(1)(e) shall not participate in any deliberation or vote on the appointment or dismissal of the President or a Vice President.” Members appointed under s8(1)(d)(e)(g) are staff members and students. We hold that these members shall have the right to full participation in the selection of President and Vice President.

¹³ Section 8(1)(g) of The Hong Kong Institute of Education Ordinance provides for “a full-time student of the Institute appointed by the Council”. The Council may appoint any student it wishes under this provision. In practice, the Institute appoints the President of the Students' Union who is elected by all full-time undergraduates. We demand that this customary practice be formalized as a legal requirement.

¹⁴ One of the recommendations of the HKU Report from the Senate Task Force on Academic Freedom is to set up such a complaint handling mechanism in HKU. See the document “Academic Freedom Policy – Report from the Senate Task Force on Academic Freedom”. Accessed on the HKU website on 11 Apr 07 at www.hku.hk/acad_freedom/.

Grievance and Complaint Mechanisms: The Hong Kong Institute of Education

20. We offer the following comments and recommendations regarding the Hong Kong Institute of Education.
21. The staff handbook should be bilingual and be available in hard copy upon request.¹⁵ Staff members may choose to sign the Chinese or English version of their employment contract.¹⁶ All its employment contracts should contain the Institution's policy statement on the protection academic freedom.
22. The grievance and complaint procedure should comply with the rules of natural justice. This means that the Institute should not deprive any 'accused' of legal representation in case of serious allegation or consequence, such as dismissal or suspension from service.¹⁷ A staff member who is the subject of any disciplinary proceedings should be allowed to choose another staff member (who can be a lawyer) to accompany him/her during hearings.¹⁸ A substantial reason should be provided in the Institute's decision statement.¹⁹
23. The Institute should improve the grievance/complaint handling procedure by stipulating clearly the timeline of complaint handling, e.g., exchange of documents. The Institute should explain to the complainant and the 'accused' the mechanism, procedure and their rights.
24. The scope of the Staff Appeals Sub-Committee should not be limited only to those cases that might have been mishandled procedurally.²⁰ If a staff member challenges the Institute's decision through judicial review, the court may quash a decision that no reasonable decision-maker would have made. There should be an internal appeal mechanism to consider the merit of cases with reference to the fairness of the decision itself. Otherwise, staff members will be forced to seek justice by lawsuits.

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15 July 2008

¹⁵ There is only an online English version.

¹⁶ Employment contracts are available only in English.

¹⁷ Paragraph 28 of Chapter 3 of the Staff Handbook, under the section titled "*Conduct of the Enquiry by the Grievance Committee*". Accessed on the HKIED Intranet on 15 July 2008.

¹⁸ A lawyer colleague is specifically prohibited to accompany an accused during a hearing. See paragraph 19 of the Guidelines and Procedures for Disciplinary Matters., accessed on the HKIED Intranet on 15 July 2008.

¹⁹ In practice, the reason provided is so brief that the accused does not have any idea about the grounds of the decision or what evidence had been held against him/her.

²⁰ Paragraph 4 of the Procedures for Meetings and Quorum of the Staff Appeal Sub-Committee, the Hong Kong Institute of Education.