

立法會
Legislative Council

Ref : CB2/PL/CA

LC Paper No. CB(2)526/10-11
(These minutes have been seen
by the Administration)

Panel on Constitutional Affairs

Minutes of meeting
held on Monday, 17 May 2010, at 2:30 pm
in the Chamber of the Legislative Council Building

Members present : Hon TAM Yiu-chung, GBS, JP (Chairman)
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP (Deputy Chairman)
Hon Albert HO Chun-yan
Dr Hon Margaret NG
Hon CHEUNG Man-kwong
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Dr Hon Philip WONG Yu-hong, GBS
Hon LAU Kong-wah, JP
Hon LAU Wong-fat, GBM, GBS, JP
Hon Miriam LAU Kin-ye, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon LI Fung-ying, BBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon WONG Kwok-hing, MH
Hon LEE Wing-tat
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon CHEUNG Hok-ming, GBS, JP
Hon WONG Ting-kwong, BBS, JP
Hon Ronny TONG Ka-wah, SC
Hon CHIM Pui-chung
Prof Hon Patrick LAU Sau-shing, SBS, JP
Hon Cyd HO Sau-lan
Dr Hon LAM Tai-fai, BBS, JP
Hon CHAN Kin-por, JP
Dr Hon Priscilla LEUNG Mei-fun
Hon CHEUNG Kwok-che
Hon WONG Kwok-kin, BBS
Hon IP Kwok-him, GBS, JP
Dr Hon PAN Pey-chyou

Hon Paul TSE Wai-chun
Dr Hon Samson TAM Wai-ho, JP

Member attending : Hon LEE Cheuk-yan

Members absent : Hon WONG Yung-kan, SBS, JP
Hon Timothy FOK Tsun-ting, GBS, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon Mrs Regina IP LAU Suk-yeet, GBS, JP

Public Officers attending : Item III

Mr Stephen LAM Sui-lung
Secretary for Constitutional and Mainland Affairs

Miss Adeline WONG Ching-man
Under Secretary for Constitutional and Mainland Affairs

Mr Arthur HO Kin-wah
Deputy Secretary for Constitutional and Mainland Affairs

Ms Christina CHONG Yau-ling
Principal Assistant Secretary for Constitutional and Mainland Affairs

Miss Helen TANG
Deputy Director of Administration

Mr Hillman CHOW
Government Records Service Director

Mr LI Tin-yiu
Chief Executive Office
(Records Management and Administration)

Item IV

Mr LAM Woon-kwong, GBS, JP
Chairperson, Equal Opportunities Commission

Ms Maggie WU Su-ka
Senior Equal Opportunities Officer (Compliance)

Mr Stephen SUI
Commissioner for Rehabilitation
Labour and Welfare Bureau

**Attendance by : Item III
invitation**

Mr Simon CHU

Dynamic Island

Mr WU Pat-lun, Felix
Spokeperson

Hong Kong Public Records Concern Group

Mr Simon LI
Convenor

Seanew Media Company Limited

Mr LAW Tsz-wai

Hong Kong Human Rights Monitor

Mr KWOK Hiu-chung
Education Officer

Hong Kong Human Rights Commission

Mr TSOI Yiu-cheong, Richard
Member

Society for Community Organization

Mr WONG Chi-yuen
Community Organizer

Civic Exchange

Miss YIP Yan-yan
Chief Operating Officer

Archive Action Group

Ms Stacy Gould
Member

Mr Don Brech

Hong Kong Archives Society

Mr Danny CHIN
Chairman

Royal Asiatic Society Hong Kong Branch

Mr Alain le Pichon
Member

Item IV

Dynamic Island

Mr WU Pat-lun, Felix
Spokeperson

Hong Kong Human Rights Monitor

Mr CHONG Yiu-kwong
Chairperson

Society for Community Organization

Miss Annie LIN
Community Organizer

香港聾人及手語文化協會

Mr Ken CHEUNG

Clerk in attendance : Miss Flora TAI
Chief Council Secretary (2)3

Staff in attendance : Mr Arthur CHEUNG
Senior Assistant Legal Adviser 2

Ms Clara TAM
Assistant Legal Adviser 9

Mrs Eleanor CHOW
Senior Council Secretary (2)4

Ms Wendy LO
Council Secretary (2)3

Mrs Fonny TSANG
Legislative Assistant (2)3

Miss Lulu YEUNG
Clerical Assistant (2)3

Action

I. Information papers issued since the last meeting

Members noted that the following papers had been issued since the last meeting -

- (a) letter dated 27 April 2010 from Ms Emily LAU on the Framework Agreement on Hong Kong/Guangdong Co-operation [LC Paper No. CB(2)1426/09-10(01)]; and
- (b) letter dated 12 May 2010 from Ms Emily LAU on the question of whether the Chief Executive ("CE") had requested the President of Legislative Council ("PLC") to vote in support of the package of proposals for the methods for selecting CE and for forming the Legislative Council ("LegCo") in 2012 ("the proposed package") [LC Paper No. CB(2)1538/09-10(01)].

II. Items for discussion at the next meeting

[LC Paper Nos. CB(2)1517/09-10(01) to (02)]

Item proposed by Ms Emily LAU

2. Members noted that in a television interview broadcasted at the end of April 2010, the incumbent PLC remarked that he would consider resigning from his presidency to vote in favour of the proposed package, if he was convinced that without his vote, the proposed package would fail to secure LegCo's endorsement resulting in damage to the overall interests of society. According to some pan-democratic Members who met PLC on 7 May 2010,

Action

they were given to understand that CE had urged PLC to vote in favour of the proposed package. On the following day, CE's Office had issued a statement clarifying that it was groundless hearsay, and that CE had never been in contact or discussion with PLC regarding his voting preference for the constitutional reform proposal. PLC also clarified that CE and other government officials had never lobbied him to vote or to resign and that quoting his comments out of context amounted to a breach of integrity, as Members participating at the meeting had undertaken not to quote one another. In her letter dated 12 May 2010, Ms Emily LAU expressed concern that the incident had impacted on the relationship between the Executive and the Legislature and suggested that the item be put on the agenda for discussion at the Panel meeting.

3. The Chairman said that he decided against inclusion of the item proposed by Ms Emily LAU as a discussion item at the meeting because there was already a heavy agenda. He sought members' views on whether the item should be put on the agenda of a future Panel meeting.

4. Ms Emily LAU said that she had copied her letter to the Secretary for Constitutional and Mainland Affairs ("SCMA") and CE's Office. She said that none of the former PLCs had ever resigned for the purpose of casting his/her vote in the Council. The incumbent PLC's intention to do so had undermined the dignity and traditions of LegCo. She therefore suggested discussing the item at a future Panel meeting.

5. Mr IP Kwok-him, Mr LAU Kong-wah and Mr Paul TSE considered that the item should not be discussed by this Panel. Mr IP said that it was inappropriate for the Panel to discuss matters relating to PLC, especially when it involved hearsay. Mr LAU said that hearsay was not a fact. As PLC had already written to Members explaining his stance, there was no case to discuss the item any more. Mr TSE queried whether it would be fair for the Panel to discuss the item in the absence of PLC who would be unable to respond to comments made by members.

6. Mr LEE Wing-tat and Mr CHEUNG Man-kwong, however, expressed support for Ms Emily LAU's suggestion. They said that PLC's television interview was a fact and the reason for his resignation per se was worthy of discussion by the Panel. They said that PLC was, by convention, politically neutral and should not vote on any matters in the Council. The intended action of the incumbent PLC to resign in order to vote would impact on future PLCs and undermine the constitutional conventions and values upheld by LegCo.

Action

7. Ms Miriam LAU said that given that PLC was elected by Members, the House Committee might be the appropriate forum to discuss the item. Ms Emily LAU said that if the item was discussed at a meeting of the House Committee, no government officials would be present to respond to members' questions.

8. In response, SCMA said that the Administration had already made clear its position in the statement issued on 8 May 2010. The Administration respected the decision of PLC in discharging his constitutional duties. The Administration would continue to lobby support for the proposed package from political parties and Members.

9. Dr Philip WONG suggested that the Panel should decide whether to discuss the item at its next meeting by a show of hands. Mr CHEUNG Man-kwong said that members had the right to suggest items for the Panel's discussion, as long as they were within the terms of reference of the Panel. He cautioned that the Panel's decision should not be made lightly simply by a show of hands as this would set an undesirable precedent of suppressing minority views and infringing freedom of expression. He pointed out that although PLC had explained his stance, not all the Members were satisfied with his reply. In addition, PLC had made the electoral pledge to maintain impartiality. Mr CHEUNG added that while PLC could continue to explain his position, the Administration should offer an explanation to dispel any doubts among the public.

10. Mrs Sophie LEUNG said that it was not the first time that a Panel had put a matter before members for a decision. She said that PLC had already clarified his position, and the item proposed for the Panel's discussion was a storm in a tea cup. She also considered that the House Committee might be the more appropriate forum to deal with the issue.

11. Mr LAU Kong-wah said that at a meeting of the Subcommittee on Package of Proposals for the Methods for Selecting the CE and for Forming LegCo in 2012 at which the same issue was raised, SCMA had already given a response. In addition, PLC had clarified that he had not breached his electoral pledge because he would resign if he intended to vote on the proposed package. Mr LAU pointed out that it was not uncommon for government officials to interact with Members with a view to lobbying support for its legislative and financial proposals. From this perspective, both PLC and the Administration had made known their stance to the public.

Action

Mr IP Kwok-him also considered it inappropriate for the Panel to discuss the act of PLC given that there were different sayings and contradictory remarks about the discussions held at that closed door meeting between the 10 pan-democratic Members and PLC.

12. Mr CHEUNG Man-kwong said that lobbying support from Members and lobbying support from PLC were two different issues, the latter of which would undermine the political neutrality of PLC. Mr LEE Wing-tat said that all the 59 Members expected that PLC would act in a just, fair and impartial manner, irrespective of whether he was associated with any political party. Members were not concerned about the act of Mr Jasper TSANG per se, but his act in the capacity of PLC, which would impact on future PLCs and the convention of LegCo.

13. Mr Albert HO said that he was one of the 10 Members who had attended the closed door meeting with PLC. He said that the participants had promised not to quote one another after the meeting and his principle was to keep that promise, but not to lie at the same time. He said that the 10 Members were fully aware of who was telling the truth and who was telling lies and there were no contradictory remarks.

14. Ms Cyd HO said that she was one of the 10 Members attending the meeting and she had affirmed the remarks made to the media by Mr LEE Cheuk-yan. She admitted that she had undertaken not to quote one another after the meeting. However, Members were accountable to the public and the disclosure of important facts to the public was not unprecedented. She stressed that the Administration had the duty to explain its position on the matter. She added that the constitutional conventions of LegCo should be written down for future reference.

15. Dr Margaret NG said that the crux of the matter was whether the item proposed by Ms Emily LAU was within the terms of reference of the Panel. If the Chairman ruled that it was, a time slot should then be arranged for its discussion. If not, the Panel should not deal with the item. Ms Audrey EU concurred with Dr NG. Ms EU said that the incident had attracted public attention and the Chairman could not evade his responsibility by asking members to decide on the matter by a show of hands. Dr NG and Ms EU urged the Chairman to give a ruling on whether the item proposed by Ms Emily LAU should be discussed by the Panel.

Action

16. The Chairman said that when he received Ms Emily LAU's request, he had doubts as to whether the item should be discussed in the Panel. While the relationship between the Executive and Legislature was an issue within the terms of reference of the Panel, narrowing down the discussion to the contents of the discussions held at the closed door meeting between PLC and pan-democratic Members who had undertaken not to quote one another was a very different matter. As the Administration had already issued a statement and PLC had clarified his stance, he considered that the item did not need be discussed in the Panel. He further declared interest that he and PLC were affiliated with the same political party. In order to avoid any perceived conflict of interest, he had requested members to give views and to decide on whether to put the item on the agenda of a future Panel meeting.

17. Dr Margaret NG and Mr CHEUNG Man-kwong said that the Chairman had the duty to rule on whether the item proposed by Ms Emily LAU was within the terms of reference of the Panel. It was inappropriate for him to ask members to decide by a show of hands. Dr NG said that while the Chairman could listen to members' views, he was obliged to make a ruling at the end. If the Chairman was concerned about conflict of interest, he could withdraw from the meeting and let the Deputy Chairman preside and make the ruling. The Deputy Chairman said that to avoid conflict of interest, it was proper for the Chairman deciding not to make a ruling on his own.

18. The Chairman said that since he had already declared interest, he would continue to preside the meeting. He said that it was not uncommon for PLC to seek the views of the House Committee before making a decision. In the circumstances, he would follow the same practice. Given that only a few members had expressed their views at the meeting, he would like to know the stance of members by a show of hands.

19. Dr Margaret NG said that a chairman should not resort to a show of hands in making his ruling which, in her view, was a departure from the conventional practices and principles. As a protest against the decision of the Chairman, she would not take part in the voting.

20. Mr LEE Wing-tat said that the Democratic Party considered that item proposed by Ms Emily LAU should be discussed by this Panel. He remarked that deciding the matter by a majority vote was tantamount to suppressing freedom of expression.

Action

21. Mr LAU Kong-wah said that the Chairman had made clear that while he should make a ruling, he considered it reasonable to listen to the views of members. Mr WONG Kwok-hing said that he supported the Chairman's decision. Mr IP Kwok-him considered it inappropriate for the Panel to discuss the item as proposed by Ms Emily LAU. Mr Paul TSE said that with the lack of facts and evidence, he doubted whether it was fair and whether there was any basis to discuss the item in the Panel. He therefore did not support Ms Emily LAU's proposal.

22. Mr WONG Kwok-kin enquired whether the Rules of Procedure ("RoP") or House Rules ("HR") allowed the chairman of a Panel to rule that a matter should be decided by the Panel.

23. Ms Emily LAU said that both RoP and HR were silent on the power of the Chairman to make a ruling. She expressed concern that the Panel would be setting an undesirable precedent if the decision of whether to discuss the issue or not was made by a majority vote.

24. In response to members, the Clerk explained that the decision of one Panel was not binding on any other committees of the Council. According to Rule 77(15) of RoP, subject to RoP, the practice and procedure of a Panel should be determined by that Panel.

25. The Chairman observed that the following members did not support Ms Emily LAU's proposal of putting the item on the agenda of a future Panel meeting : Mr LAU Kong-wah, Mr WONG Ting-kwong, Mr WONG Kwok-hing, Mrs Sophie LEUNG, Mr IP Kwok-him, Ms Miriam LAU, Mr Paul TSE and Mr CHEUNG Hok-ming; and the following members supported Ms Emily LAU's proposal: Ms Emily LAU, Mr CHEUNG Man-kwong, Mr LEE Wing-tat, Ms Cyd HO and Mr Albert HO. The Chairman concluded that based on the majority views of members, the item proposed by Ms Emily LAU would not be put on the agenda of a future Panel meeting.

26. Dr Margaret NG expressed dissatisfaction that the Chairman, in her view, had not discharged his duty as a Panel chairman by ruling on whether the item was within the terms of reference of the Panel. The Chairman did not subscribe to her view. He stressed that he had exercised the power of a chairman in conducting business of the Panel and the practice he adopted was also in a democratic manner.

Action

Other items proposed by members

27. Mr WONG Kwok-hing enquired when the Administration would submit a legislative proposal to amend the Legislative Council Ordinance (Cap. 542) ("LCO") to prevent a Member who resigned from his office to stand for re-election in the by-election to fill that vacancy for the consideration of the Panel.

28. Dr Priscilla LEUNG informed members that she had drafted a Member's Bill to amend LCO to that effect. If the Administration decided to introduce amendments to LCO, she would withdraw her proposal. SCMA responded that the Administration was studying and seeking legal opinion on the matter, and would revert to the Panel in due course.

29. Ms Emily LAU enquired when the item relating to the electoral method for the 2011 District Council ("DC") election would be discussed by the Panel. She had requested the Administration to consider her proposal of adopting the proportional representation system for returning DC members in future. SCMA responded that the Administration had focused its work on the proposed package for the time being. The electoral method for DC election would be dealt with in July 2010 or after the summer recess depending on the progress of the proposed package. He assured members that there would be sufficient time to deal with issues relating to the 2011 DC election.

Item proposed by the Administration

30. Members agreed that as proposed by the Administration, the Panel would discuss and receive views on "An outline of the topics in the third report of the Hong Kong Special Administrative Region in the light of the International Covenant on Civil and Political Rights" at the next meeting to be held on 21 June 2010.

III. Code on access to information and management of public records
[LC Paper Nos. CB(2)1517/09-10(03) to (06), CB(2)1541/09-10(01), CB(2)1551/09-10(01) to (03), and CB(2)1578/09-10(01) to (02)]

31. SCMA briefed members on the background of the Code on Access to Information ("the AI Code") and the improvements measures undertaken by the Administration in response to the observations and recommendations

Action

made in The Ombudsman's Direct Investigation Report on Administration of the AI Code ("The Ombudsman's Report"). Deputy Director of Administration ("DDA") briefed members on the management of public records as set out in the Administration's paper [LC Paper No. CB(2)1517/09-10(03)].

32. Members noted the background brief prepared by the LegCo Secretariat [LC Paper No. CB(2)1517/09-10(04)] on the subject under discussion.

(Post-meeting note: The submissions from Mr HO Man-kit and Mr YEUNG Wai-sing, member of Sai Kung District Council and member of Eastern District Council respectively, were tabled at the meeting and issued to members vide LC Paper No. CB(2)1578/09-10 on 18 May 2010.)

33. Members noted that the AI Code was introduced in March 1995 to serve as a formal framework for the provision of information held by government bureaux and departments. The Constitutional and Mainland Affairs Bureau ("CMAB") was responsible for the administration of the AI Code from July 2007. The Code defined the scope of information which bureaux and departments were to provide, either routinely or on request, and set out procedures and timeframes by which such information was to be made available. Each bureau/department was required to designate its own Access to Information Officer who would be responsible for promoting and overseeing the application of and compliance with the AI Code.

34. Members also noted that under the current government structure, the Government Records Service ("GRS") under the Administration Wing of Chief Secretary for Administration's Office ("CS' Office") was tasked to oversee the management of government records on a government-wide basis. GRS had promulgated records management procedures and guidelines on management of government records, and provided records management training and advice to help bureaux and departments enhance their records management. In line with the administrative framework set by GRS, bureaux and departments had appointed Departmental Records Managers to manage and maintain government records. Access to archival records transferred to GRS was managed through the Public Records (Access) Rules 1996.

Action

Presentation of views

35. Mr Simon CHU said that he had worked in GRS for over 20 years. He held the view that enacting archival and freedom of information legislation was the right direction to ensure proper management of records and right of access to information. Based on the experiences of overseas jurisdictions, an archival law was usually enacted before a freedom of information law. In the United Kingdom ("UK"), the archival law was enacted in 1838 and amended in the 1950's and in 1967 respectively while the freedom of information law was enacted in 2000. In the People's Republic of China, the archival law and the access to information law were enacted in 1987 and 2008 respectively. Mr CHU considered that freedom of information legislation should be underpinned by archival legislation. The amendments to the archival law in 1967 in UK had prompted the setting up of the then Public Records Office in Hong Kong which was later renamed as GRS. He explained that an archival law only required the Government to create, document and maintain full and accurate records as evidence of their functions and activities. These records would then be passed to an archival authority for assessment and preservation. Records which were considered as having archival value would be permanently preserved to form part of the community's collective memory. The two pieces of legislation complementing each other would enhance accountability of the Government. He added that the Administration should consider the sample legislation drafted by the Archives Action Groups ("AAG").

36. Mr WU Pat-lun of Dynamic Island said that while the Administration had claimed that 90% of the requests for information made to bureaux and departments were met in full, he had heard complaints from members of the public that they could not access to government information. He doubted about the adequacy of government services provided to the public in this respect. Mr WU considered that the scope of information to which access might be refused, as set out in Part 2 of the AI Code, was too broad and unclear. For instance, it was obscure as to whether the requested information was related to the privacy of an individual or was held for or provided by a third party under an explicit or implicit understanding that it would not be further disclosed. In his view, the Administration had used Part 2 of the AI Code as excuses to refuse public's access to information. He further queried the rationale of not applying the AI Code to certain bureaux, such as the Civil Service Bureau, and some public bodies. Mr WU considered that the Administration should explain the complaint

Action

mechanism if an Access to Information Officer refused to provide the requested information to a member of the public. He advocated the enactment of an archival law and a freedom of information law.

37. Mr Simon LI of Hong Kong Public Records Concern Group ("HKPRCG") said that if a department was required to search additional information or to edit existing information in order to provide the information requested by a member of the public, it could simply turn down the request by saying that there was no such record. He recalled that the Public Accounts Committee conducted an investigation into the change of land use in Discovery Bay some six years ago to ascertain who should be held accountable for the loss of government revenue of \$160 million, but to no avail because of lack of records and failure to document relevant decisions by the government department concerned. Mr LI considered that if an archival law had been put in place, the Government would have created and maintained full and accurate records as evidence of their functions and activities, and "no such record" would not be used as an excuse to deny public's right to know. He stressed that archival legislation was the basis for accountability and cornerstone of democracy, the absence of which would render freedom of information legislation ineffective. Mr LI also expressed concern that officers in GRS were mainly of general grade, who would change posting from time to time and did not have the expertise to manage archives. Views of HKPRCG were detailed in its submission [LC Paper No. CB(2)1541/09-10(01)].

38. Mr LAW Tsz-wai of Seanew Media Company Limited ("SMCD") urged the Administration to enact an archival law and a freedom of information law to prevent important information being destroyed, to make GRS a statutory body independent from the Government, to ensure that GRS was manned by professional staff with expertise in management of records, to promote and to educate the public about the information and services available in GRS. Views of SMCD were detailed in its submission [LC Paper No. CB(2)1517/09-10(05)].

39. Mr KWOK Hiu-chung of Hong Kong Human Rights Monitor ("HRM") expressed concern that civil servants who had breached the AI Code or the records management procedures and guidelines would not be subject to disciplinary action. He criticized that the AI Code did not cover all the bureaux, departments and public bodies. In addition, the scope of information to which access might be refused was too broad and unclear. Mr KWOK quoted the example that the Commissioner for Interception of

Action

Communications and Surveillance had raised an issue of concern in his Annual Report 2008 to CE that an officer of the Independent Commission Against Corruption ("ICAC") had improperly destroyed intercepted products and related records obtained in a wrongful interception, making the Commissioner impossible to conduct certain checks in discharging his duty. He also referred to the case of *Chu Woan-chyi & Others v Director of Immigration (CACV 119/2007)* in which the Court had criticized the motive of the Immigration Department in destroying certain records relating to its decision to refuse entry of some Falun Gong members. He considered that these two examples illustrated the need to enact an archival law and a freedom of information law to ensure proper management of records, to protect the right of people to information, and to monitor the work of the Government.

40. Mr TSOI Yiu-cheong of Hong Kong Human Rights Commission ("HKHRC") advocated the enactment of freedom of information legislation. He pointed out that the AI Code was not legally binding, the complaint mechanism for refusal of information was not independent, the AI Code did not apply to certain bureaux, departments and public bodies, and the scope of information to which access might be refused was too broad and unclear. The views of HKHRC were detailed in its joint submission with the Society for Community Organization ("SOCO") [LC Paper No. CB(2)1551/09-10(01)].

41. Mr WONG Chi-yuen of SOCO advocated the enactment of archival legislation. He expressed concern that GRS did not have the statutory power to order bureaux and departments to document their functions and activities. In addition, information concerning policy formulation was not accessible to the public. He said that Hong Kong should consider setting up an independent body, similar to the Advisory Council on National Records and Archives in UK, to advise the Government on the preservation of government records. Mr WONG also urged the Administration to consider shortening the period during which classified information was closed for public access from 30 years to 20 years. The views of SOCO were detailed in its joint submission with HKHRC [LC Paper No. CB(2)1551/09-10(01)].

42. Miss YIP Yan-yan of Civic Exchange said that the enactment of an archival law and a freedom of information law would be conducive to ensuring good governance. She considered the existing framework ineffective. Civic Exchange supported the measure undertaken by the

Action

Administration to follow up with other public bodies within The Ombudsman's purview so that the AI Code would be applicable to all public bodies. She shared the views of other deputations that while archival legislation and freedom of information legislation should work hand in hand, the former was more important. She added that Civic Exchange had studied the policies for access to information and management of public records since 2006 and had published a report on the subject in 2007. She welcomed the Administration and members to make reference to that report which was still applicable to the present situation.

43. Ms Stacy Gould of AAG said that there was a close link between archival legislation and the access to information policy. The successful implementation of access to information policy depended primarily on the proper creation and preservation of government records. Government records had to be controlled and maintained by a professional and effective management system so that information sought would be identified, located and retrieved in a timely and cost-effective manner. In her view, the existing administrative framework did not provide the necessary regulation to support the function of the Government in record-keeping. In the absence of legislation to ensure the creation of complete and accurate records and their subsequent management in accordance with international standards and best practices, the AI Code would be ineffective. She advised that AAG had drawn up a sample legislation that it would like to see enacted in Hong Kong. The views of AAG were detailed in its submission [LC Paper No. CB(2)1551/09-10(02)].

44. Mr Danny CHIN of Hong Kong Archives Society ("HKAS") said that while many people had requested for government information every year, many of them did not know the types of government records kept in bureaux, departments and GRS. There should be a catalogue of archives setting out the records available for public access. He noted that some bureaux and departments were uncertain as to whether records of the past three decades were kept, and if so, what types of information were available. In the absence of archival legislation, Mr CHIN expressed concern whether GRS had the authority to perform its role effectively and how the GRS Director could ensure that bureaux and departments would keep him informed of their decisions to destroy government records in advance. He also expressed concern whether GRS had adequate manpower and whether GRS staff had been professionally trained to manage government records. He pointed out that Hong Kong was one of the few places in Asia which did not have an archival law. In his view, enacting archival legislation was

Action

beneficial to the people of Hong Kong and helped enhance accountability of the Government. The views of HKAS were detailed in its submission [LC Paper No. CB(2)1517/09-10(06)].

45. Mr Alain le Pichon addressed the Panel in the capacity of historian and President of Royal Asiatic Society Hong Kong Branch ("RASHKB"). He explained the relationship among history, historians and archives. In gist, historians interpreted facts into meaningful stories and stories of identity, which would become history of a community. He said that society's well-being was not only based on financial success and achievement, but also based on the community having a strong sense of identity. The most important of all the facts were archives recorded by the government. The integrity of historical work had to be safeguarded by the integrity of archival system managed by the government. RASHKB advocated the enactment of archival legislation. In order to ensure effective management of government records, rules had to be put in place to which the government would be abided by, application of such rules had to be practical, and a system should be put in place to monitor and audit the application of rules and the rules themselves. The views of RASHKB were detailed in its submission [LC Paper No. CB(2)1551/09-10(03)].

Discussion with members

Enacting an archival law and a freedom of information law

46. Dr Margaret NG said that the deputations had unanimously advocated the enactment of archival legislation to ensure proper management of public records and their availability for public access. Dr NG enquired whether the Administration had maintained dialogue with these organizations on a regular basis and how the Administration would respond to the issues raised.

47. DDA said that GRS had exchanged views with the relevant organizations from time to time and would be happy to introduce GRS' services to them. At the request of Dr NG, the Administration undertook to -

Admin

- (a) provide a response to the views expressed and recommendations made by the deputations at the meeting and in the submissions received;

Action

- (b) advise the Panel on whether it had exchanged views with organizations which had studied and researched on archival laws and freedom of information laws and the Administration's response to the views given; and
- (c) report to the Panel its future meetings with organizations interested in the subject of access to information and management of public records and its response to the views given.

48. Some members including Dr Margaret NG, Ms Emily LAU, Ms Cyd HO and Mr LEE Wing-tat supported the introduction of archival and freedom of information legislation so that information and decisions of public offices would be properly documented and preserved for public access. Ms LAU and Mr LEE expressed concern that Hong Kong was lagging behind other Asian places in respect of enacting archival and freedom of information legislation.

49. On the deputations' requests for archival legislation, DDA responded that the Administration had studied the archival laws of other jurisdictions and was satisfied that the basic principles of records management enshrined in archival legislation were already embedded in the administrative framework adopted in Hong Kong. These principles included, among others, setting out records keeping standards, obligations and responsibilities of government bodies relating to keeping, maintenance and protecting public records, requirement to seek prior authorization for disposal of records, and rights of the public to access to public records. As it was the Administration's policy to identify and preserve records of archival value for the people of Hong Kong, bureaux and departments were required to seek the prior consent of the GRS Director for any destruction of their records. As an ongoing effort, the Government kept the current administrative arrangements for records management under review and would improve on them where appropriate. For instance, a set of mandatory records management requirements was introduced in April 2009 for compliance by bureaux and departments. These requirements covered proper management of e-mail records, records classification, records disposal, proper custody and storage of records, and protection of vital records. The Administration considered that the present records management system was functioning effectively and did not see the need for archival legislation for the time being.

Action

50. SCMA said that the AI Code had been in force for over a decade. A person who considered that a bureau or department had failed to comply with the AI Code in respect of provision of information could lodge a complaint with The Ombudsman who would follow up the case with the relevant bureau or department. Experience so far demonstrated that the AI Code generally provided an effective framework to provide access for members of the public to a wide range of information held by the Government. In this connection, the Administration did not plan to introduce legislation at this stage. It would, however, consider the views put forth by the deputations. The Administration would also regularly review the AI Code and its implementation, and take further measures to promote awareness of and compliance with the AI Code by bureaux and departments.

51. Mr LEE Wing-tat did not subscribe to the view that the existing framework for access to information was effective. He informed members that during the CE's Question and Answer Session on 6 May 2010, he had asked about the long-term housing strategy regarding land supply and the number of flats to be built but was dismayed by being told that the strategy was no longer in existence. Mr LEE considered that enactment of archival legislation was necessary. Had there been a systematic management of archival records and effective provision of public information, Members and the public could keep track of the development of the matter on their own instead of pressing the Administration for information.

52. SCMA responded that the AI Code had proven to be effective in dealing with public requests in the past decade. The implementation of the AI Code by bureaux and departments was monitored by CMAB and complaints could be lodged with The Ombudsman. Between March 1995 and December 2009, 125 complaints were filed with the Ombudsman, of which 111 cases had been completed as at 31 December 2009. Of these 111 completed cases, 11 were substantiated and 11 were partially substantiated. The Administration would introduce legislation only when there was a need to do so. Since the present system was functioning effectively, the Administration would continue to improve on it.

53. Ms Cyd HO sought the views of the deputations on the principles for documenting government information with a view to monitoring the work of the Government effectively. She understood that individual views and names would not be recorded in the minutes of some Government meetings which only documented collective decisions. As a result, there was no clue

Action

to trace whether certain decisions were initiated by any particular attendee. She expressed concern about the possibility of corrupt activities if the work of the Government could not be monitored because of improper documentation of official business.

54. Mr Simon CHU advised members that according to his understanding of the established practice in the Government, the day-to-day business of bureaux and departments would be documented and filed, irrespective of the nature of the business. As to whether the documents would be preserved as archival records, archivists of the Public Records Office would, based on their professional judgment, determine whether the records were having historical value. Records which were considered as having historical value would be kept at the Hong Kong Public Records Building for permanent preservation. If there was archival legislation, the creation, preservation and storage of records would be managed in a professional manner by professionally trained staff.

Admin

55. Responding to Ms Cyd HO's view, SCMA advised that all the civil servants were trained to put official business including deliberations and decisions of issues in writing. At Ms HO's request, SCMA undertook to advise the Panel on whether there were any internal guidelines on minutes-writing and if so, the circumstances under which the names or post titles of the persons who gave opinions, advice, or recommendations during the meetings would be recorded. SCMA further said that the work of the Government was monitored by a number of bodies including LegCo, ICAC and the media. In addition, many social, economic and political issues and financial proposals were discussed in open forums with relevant papers provided. In his view, the operation of the Government was transparent and the disclosure of government information was comprehensive.

56. Dr Margaret NG sought the views of the deputations about the adequacy of the existing administrative guidelines on records management, and the effectiveness of the arrangement for individual bureaux and departments to establish their own records management programme, with GRS overseeing the overall management. Dr NG was concerned that while deputations held the view that archival and freedom of information legislation should be enacted, the issues were dealt with separately under the existing administrative framework with GRS being put under the CS' Office whereas the administration of the AI Code was under the purview of CMAB.

Action

57. Mr Simon LI of HKPRCG considered the existing framework for management of public records and access to information inadequate. The crux of the problem was that GRS lacked power and the GRS Director could not command bureaux and departments to follow the relevant guidelines, given his rank was lower than those of heads of bureaux and departments. In this connection, the GRS Director did not have full information as to whether bureaux and departments had complied with the procedures for management of and access to public records. In the absence of archival and freedom of information legislation, Mr LI was not confident that the existing situation would improve.

58. Dr Priscilla LEUNG asked whether deputations considered that The Ombudsman's Office could serve as an effective complaint mechanism in monitoring the administration of the AI Code. Mr KWOK Hiu-chung of HRM said that the problem was that the public was uncertain about the types of information available for public access in the first place.

59. Dr Margaret NG enquired about the Administration's views on the setting up of an independent monitoring mechanism over the compliance with the AI Code and the administration of public records as suggested by some deputations. SCMA responded that heads of bureaux and departments attached great importance to the work of The Ombudsman in handling complaints on the administration of the AI Code. The Ombudsman's Report, which was made public, contained a number of observations and recommendations for more effective administration of the AI Code. CMAB was working with bureaux and departments to ensure appropriate follow-up actions on The Ombudsman's recommendations. At the request of Dr Margaret NG, the Administration undertook to provide a response to the suggestion that an independent body should be set up to monitor the administration of public records.

Admin

Information which may be refused

60. Pointing out that some deputations had considered that the scope of information to which public access might be refused as set out in Part 2 of the AI Code was too broad and unclear, Ms Miriam LAU enquired whether the Administration would conduct a review on the AI Code with a view to narrowing the scope. She also enquired whether Part 2 of the AI Code had made reference to overseas practices in particular those of UK.

Action

61. SCMA explained that the AI Code authorized and required bureaux and departments to provide the public with information requested unless there were valid reasons to withhold disclosure under circumstances as specified in Part 2 of the AI Code. The categories of information to be withheld including those concerning defence and security, external affairs, nationality, immigration and consular matters, etc. were similar to those adopted by overseas jurisdictions. SCMA further said that the Administration had kept in view the developments in other countries to ascertain the need for updating the AI Code. While major changes had not been made to the AI Code since 1995, the internal guidelines circulated to bureaux and departments had been updated from time to time. Deputy Secretary for Constitutional and Mainland Affairs ("DSCMA") supplemented that the internal guidelines were issued to bureaux and departments to facilitate the implementation of the AI Code. The guidelines set out how information should be made available to the public in response to a request, and the circumstances under which the information should be withheld. The guidelines had been updated from time to time to include examples to illustrate how requests for information could be handled more promptly and helpfully. Under Secretary for Constitutional and Mainland Affairs ("USCMA") added that while the categories of information to which public access could be refused might vary from country to country, the practices of Hong Kong and UK were similar. Information relating to formulation of government policy was one of the categories withheld by the UK Government.

62. Ms Cyd HO sought the views of the deputations about the classification that papers prepared for, and records of meetings and deliberations of Executive Council ("ExCo") should not be available to the public.

63. Mr WU Pat-lun of Dynamic Island considered that the scope of information to be withheld as set out Part 2 of the AI Code was too wide and unclear. In his view, management of public records should be operated by an independent department directly accountable to CE instead of working under the CS' Office. The department should make independent decisions on the records to be kept, classified, preserved and destroyed.

64. Ms Cyd HO said that she understood that the Census and Statistics Department ("C&SD") would destroy the data collected during census after use, but there was a view that census data other than those with privacy implications should be kept because one could see the evolvement of society

Action

Admin based on these data. SCMA said that to his understanding, C&SD conducted the census in a professional manner in accordance with international standards. At the request of Ms HO, SCMA undertook to -

- (a) explain why papers prepared for, and records of meetings and deliberations of ExCo were classified as information to which the public could be refused to have access; and
- (b) relay to C&SD about the suggestion that data collected during census should not be destroyed after use.

Staff establishment in GRS

65. Dr Margaret NG and Ms Emily LAU expressed concern whether GRS were manned by professional persons who had the expertise to ensure proper creation, preservation and management of public records. Dr NG enquired about the staff establishment of GRS, qualifications required of the staff members of the management team, their respective ranks and duties. Ms LAU expressed concern about the staff morale of GRS as she was told that a number of key staff members had resigned. She was also concerned whether GRS had the power and professional capacity to perform its role effectively.

Admin 66. Government Records Service Director explained that GRS had a total of 85 staff on its establishment, including staff from the executive, curator and archivist grades at the officer level. The executive grade staff members were responsible mainly for the administration of GRS and implementing policies for the management of public records, the curator in GRS was responsible for preserving government records and providing a secure and controlled environment for the protection of archival materials for permanent preservation, while the archivists were responsible mainly for overseeing the daily operation of the Public Records Office (which was the designated government archive of the Hong Kong Special Administrative Region), identifying and acquiring government records having archival value. There was only one member of the archivist grade who had tendered resignation recently. As regards the effectiveness of its operation, GRS had fulfilled its performance pledges, including making records and library items available to users in the Search Room within two hours. The Administration undertook to provide the requested information in writing.

Action

IV. Public Consultation on the Revised Code of Practice on Employment under the Disability Discrimination Ordinance

[Consultation document on "Revised Code of Practice on Employment under the Disability Discrimination Ordinance", LC Paper Nos. CB(2)1517/09-10(07) to (10), CB(2)1551/09-10(04), and CB(2)1578/09-10(03)]

67. Members noted that the existing Code of Practice on Employment under the Disability Discrimination Ordinance ("the DDO Code") had been in use since 1997, providing general guidance to employers in Hong Kong on implementing equality of opportunities between persons with disabilities ("PWDs") and those without. EOC had prepared a paper [LC Paper No. CB(2)1517/09-10(07)] seeking members' views on the revised DDO Code which had been published on 8 April 2010 for a three-month public consultation until 8 July 2010.

68. Members also noted the following papers on the subject under discussion -

- (a) background brief prepared by the LegCo Secretariat [LC Paper No. CB(2)1517/09-10(08)]; and
- (b) submission from Dr YANG Mo, member of Southern DC [LC Paper No. CB(2)1517/09-10(10)].

Deputations' views and EOC's response

69. Mr WU Pat-lun of Dynamic Island expressed support for the revised DDO Code. He hoped that the DDO Code would help ensure equal opportunities were afforded to PWDs in terms of promotion, transfer of position and granting of sick leave. He criticized that the Administration's policy for PWDs was fragmented and had failed to address their needs for integration into society. Mr WU considered that the protection afforded to PWDs should cover areas other than employment and the Government should make the best endeavour to assist PWDs. He urged the Administration to review the Disability Discrimination Ordinance (Cap. 487) ("DDO").

Action

70. Mr CHONG Yiu-kwong of HRM said that while he considered that the revised DDO Code was better than the existing DDO Code, he did not understand why EOC had rewritten the DDO Code rather than making amendments to the existing Code. He expressed concern that existing users of the DDO Code might find the revised DDO Code difficult to follow. He enquired whether EOC also intended to rewrite the Code of Practice on Employment under the Race Discrimination Ordinance and the Guide to Employers on Equal Pay between Men and Women under the Sex Discrimination Ordinance (Cap. 480) ("SDO"). On the contents and drafting of the revised DDO Code, Mr CHONG made the following comments -

- (a) the Chinese version and English version of sentence "the court shall take into account relevant parts of the Code in determining any question arising from proceedings under DDO" in paragraph 1.4 did not tally;
- (b) paragraph 2.11 should provide an example to illustrate whether harassment which was not work-related but took place in the course of employment would infringe DDO; and
- (c) it was not necessary for paragraph 12.1 to include the wording "publicly funded by the Government" given the independence of EOC.

71. Miss Annie LIN of SOCO said that SOCO had compared the revised DDO Code with the SDO Code of Practice on Employment and the Code of Practice - Employment and Occupation published by the Disability Rights Commission of UK. She considered that there should be more coverage on the provision of insurance for PWDs and prevention of harassment in the revised DDO Code. The views of SOCO were detailed in its submission [LC Paper No. CB(2)1551/09-10(04)].

72. Mr Ken CHEUNG of 香港聾人及手語文化協會 presented his views with the assistance of a sign language interpreter. He expressed dissatisfaction that EOC had not protected adequately the right of communication of people with hearing impairment. He also expressed dissatisfaction that the board members of the Hong Kong Society for the Deaf, the largest subvented non-government organization dealing with people with hearing impairment, did not know sign language. The views of

Action

香港聾人及手語文化協會 were detailed in its submissions [LC Paper No. CB(2)1517/09-10(09) and 1578/09-10(03)].

73. The Chairperson of EOC responded to the deputations' views as follows -

- (a) he shared the view of Dynamic Island that the Administration's support services for PWDs were too fragmented and lacked co-ordination. There was a need for the Administration to provide comprehensive support to help PWDs integrate into society. As the DDO Code was only one aspect of work to ensure equal opportunities for PWDs, EOC would come up with more recommendations in this regard in the near future;
- (b) EOC decided to rewrite the DDO Code because the drafting of the original DDO Code had been kept simple, adhering to the original wording of DDO to provide a quick jumpstart on its implementation back in 1997. With 13 years' accumulated enforcement experiences and taking into account feedbacks from stakeholders, EOC came to the view that it was better to rewrite than to amend the DDO Code. He noted HKHRM's comments on the contents and drafting of the revised DDO Code and would take them into account when refining the DDO Code;
- (c) EOC would consider beefing up the contents in respect of the coverage of disability harassment in the revised DDO Code to address SOCO's related concern. He explained that EOC received far more complaints on harassment under SDO than those on disability harassment in employment. Based on the facts of complaints received, EOC had included in the revised DDO Code cases of disability harassment and vilification in Chapter 9 of the revised DDO Code. As regards SOCO's concern about insurance coverage for employees with disabilities, improvements had been made in the past few years following discussions with the Hong Kong Federation of Insurers and the Commissioner of Insurance. EOC would review the need to beef up the contents in this area in the revised DDO Code; and

Action

- (d) he was aware that there were disputes among persons with hearing impairment on whether sign language should be made the medium of interpretation for people with hearing impairment. He held the view that modern technology could help resolve certain impairment problems, depending on types of physical impairment involved.

Discussion with members

Reasonable accommodation

74. Ms Emily LAU expressed concern whether barrier-free access facilities provided to PWDs in workplaces were adequate and whether employers had the responsibility to make adjustments in workplaces to provide reasonable accommodation.

75. The Chairperson of EOC explained that the provision of barrier-free access facilities was not the sole responsibility of employers, as developers and owners of commercial buildings also had a role to play, not to mention that many of the offices were leased rather than owned by the employers concerned. Under DDO, an employer had the responsibility to provide reasonable accommodation to facilitate a PWD employee fulfilling the inherent requirements of a job. The principle of reasonable accommodation and related issues were covered in Chapter 5 of the revised DDO Code. The services or facilities required by a PWD employee in a workplace would vary depending on the disability and the effect the disability had on that person. For instance, a visually impaired person might require extra equipment such as a magnifier, audio device or computer equipment to assist him to perform his job. These devices, costing an employer a meagre amount of money, would benefit both the employer and employee.

76. Mr Albert HO recalled that during the implementation of DDO, complaints had been received on the difficulty in understanding the concept of reasonable accommodation. He was aware that the principle applied to the Government and statutory bodies such as the Hospital Authority ("HA"). He had heard a complaint about a healthcare worker of HA who had hurt his back during work had been asked to retire early instead of being assigned to other duties after rehabilitation. Mr HO considered that public bodies given their large staff establishment should have room to accommodate the needs of an injured staff and identify suitable position for necessary

Action

re-deployment. Mr HO enquired whether it was the legal responsibility of the Government and public bodies to provide reasonable accommodation to an injured staff after rehabilitation and if so, whether they had adopted a consistent approach, and whether EOC would provide advice to or conciliate with the parties concerned if such a complaint was received.

77. The Chairperson of EOC responded that larger establishments indeed had more capacity to afford reasonable accommodation to employees with a disability than those of smaller size. An employer should strive to provide accommodation to an injured staff, and early retirement should only be the last resort. In the case of an employee who was injured at work and could not resume duties of his original work immediately, the employer was advised to consider the provision of accommodation in the form of temporary work to allow more time for him to recuperate, provision of services and facilities to assist him to resume duties, or transfer him to another posts if the employee was seriously injured and could no longer perform his original job requirement. The court would tend to look into whether services or facilities had been considered or reasonably afforded to the employee with a disability if an employer intended to defend that the disability had made the employee unable to carry out the inherent requirements of the job or there was unjustifiable hardship on the employer's part to provide accommodation to that employee. The Chairperson of EOC further said that the provision of accommodation by an employer was not unlimited and EOC would provide conciliation to the parties concerned when required.

Contents and drafting of the revised DDO Code

78. Dr PAN Pey-chyou expressed support for the revised DDO Code. He said that PWDs needed employment which helped them regain self-esteem. In his view, the performance of many PWDs was no different from that of their able-bodied counterparts in work. Dr PAN was particularly concerned about the protection to persons with mental health problems in employment. He pointed out that those persons were the most vulnerable group among PWDs and they might be reluctant to disclose their illnesses to employers, to take sick leave or to tell people that they were seeking psychiatric treatment because they were concerned that it would lead to discrimination at work. Dr PAN enquired whether EOC would consider including in the DDO Code the protection for persons with different disabilities, such as those with mental health problems and hearing impairment.

Action

79. The Chairperson of EOC responded that physical disabilities and mental disabilities were very different in nature. Those with mental health problems were subject to a lot of pressure including the encounter of disability harassment and vilification in the workplace because of the negative labelling effect. Many of them were reluctant to tell people that they were receiving psychiatric treatment. While the DDO Code did not seek to provide guidance for the implementation of equal opportunities in respect of a particular disability, it had set out the general application to prevent discrimination in the workplace. For instance, Chapter 7 set out how to manage disability related work absence and Chapter 9 elaborated on the definition of disability harassment and vilification. The Chairperson of EOC further said that DDO had not restricted the power of EOC to draw up guidelines for people with specific disabilities. EOC had in fact published pamphlets relating to specific disabilities including mental disability on a need basis.

80. Dr Margaret NG expressed support for the approach adopted by EOC to rewrite the DDO Code rather than making amendments to it. She pointed out that as legal language was difficult to comprehend, the DDO Code should be made user-friendly to facilitate easy understanding of employers and employees. Dr NG further said that the DDO Code, apart from educating people of what was lawful and unlawful, should promote and nourish the spirit of equal opportunities in the workplace. She added that the DDO Code should be updated from time to time in the light of the facts of cases which depicted the difficulties of enforcement of DDO.

81. The Chairperson of EOC responded that EOC aimed at making the DDO Code easily understood and user-friendly to employers and employees. The revised DDO Code provided precedent cases to help people understand important concepts in DDO and thereby follow the spirit of equal opportunities enshrined in DDO. When providing training to employers and employees, emphasis had been placed on cultivating a healthy partnership between employers and employees on working towards an equitable workplace for all. EOC intended to update the DDO Code every two to three years.

82. On the drafting aspect of the revised DDO Code, the Chairperson of EOC noted Mr Albert HO's comment that the Chinese version and the English version of paragraph 8.14 did not tally and Dr Margaret NG's comment that the Chinese version of paragraph 4.02 was not easily comprehensible. He undertook to consider their comments when refining the revised DDO Code.

Action

83. The Chairman thanked deputations and EOC for attending the meeting.

84. The meeting ended at 5:42 pm.

Council Business Division 2
Legislative Council Secretariat
9 December 2010