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Report of the Panel on Constitutional Affairs for submission to the Legislative Council

PURPOSE

This report gives an account of the work of the Panel on Constitutional Affairs during the 2009-2010 Legislative Council ("LegCo") session. It will be tabled at the Council meeting on 7 July 2010 in accordance with Rule 77(14) of the Rules of Procedure of the Council.

THE PANEL

2. The Panel was formed by a resolution passed by the Council on 8 July 1998 and as amended on 20 December 2000, 9 October 2002, 11 July 2007 and 2 July 2008 for the purpose of monitoring and examining Government policies and issues of public concern relating to implementation of the Joint Declaration and the Basic Law ("BL"), relations between the Hong Kong Special Administrative Region ("HKSAR") Government and the Central People's Government ("CPG") and other Mainland authorities, electoral matters, district organizations, human rights, personal data protection and press freedom. The terms of reference of the Panel are in **Appendix I**.

3. The Panel comprises 39 members, with Hon TAM Yiu-chung and Ir Dr Hon Raymond HO elected as Chairman and Deputy Chairman respectively. The membership of the Panel is in **Appendix II**.

MAJOR WORK

Constitutional development

4. At the Council meeting on 18 November 2009, the Chief Secretary for Administration ("CS") made a statement on the Consultation Document on the Methods for Selecting the Chief Executive ("CE") and for Forming LegCo in 2012 ("the Consultation Document") and announced the commencement of a three-month public consultation exercise. The Panel held a special meeting to discuss the Consultation Document and received views from 156 deputations/individuals at three other special meetings.

5. Some members expressed dissatisfaction that while admitting that the existing functional constituencies ("FC") system did not comply with the principles of universality and equality, the Administration had proposed adding five new FC seats which the members considered would only pose further hurdles for consensus to be reached for the ultimate abolition of all FC seats. They also considered that if there

was any restriction on the right to be elected, i.e. a requirement for the candidates to have to come from a particular sector, the FC system would not be compatible with the principles of universality and equality even though the FC seats were returned on the basis of "one-person-one-vote".

6. The Administration explained that the Decision made by the Standing Committee of the National People's Congress ("NPCSC") on 29 December 2007 ("the NPCSC Decision") had made it clear that FC seats would not be abolished in 2012. Any proposal to abolish FCs would require support from incumbent FC Members and it would be very difficult to reach consensus on the matter at this stage. However, there was ample time between the present time and 2020 for the community to discuss the specific model for implementing universal suffrage for LegCo in accordance with the principles of universality and equality.

7. Some other members were of the view that the FC system with the merit of balanced participation had its value for Hong Kong and should be retained, albeit in some other forms with changes to its electoral method, when universal suffrage was implemented for forming LegCo. They considered that the FC system was not necessarily incompatible with the principles of universality and equality.

8. The Administration advised that there were views that the FC seats should be abolished in one go and replaced by district-based seats returned by universal suffrage, i.e. the "one-person-one-vote" model. There were also views that the FC seats should be retained, but the electoral model should be changed. For example, the "one-person-two-votes" model whereby each voter could cast one vote in the geographical constituencies ("GC") election, and the other in the FC election. For the "one-person-31-votes" model, each voter could cast one vote in the GC election, and 30 votes in the FC election. However, there was concern as to whether the FC system on the basis of one-person-multi-votes would comply with the principles of universality and equality if there was restriction on the right to be nominated. These issues were open to discussion.

9. Some members expressed dissatisfaction with the Administration's refusal to replace corporate votes with individual votes. These members considered that to comply with the principle of gradual and orderly progress, the Administration should have considered broadening the electorate base of FCs in 2012.

10. The Administration explained that the process of replacing corporate votes with "director's/executive's/association's/individual votes" was complex. It would not be easy for the community to reach consensus on the matter. The Administration's proposal to allocate five additional FC seats to DC members would enhance the democratic elements of the LegCo election as the total electorate of the 405 constituency areas of DCs was 3.3 million.

11. Some members expressed reservations about the Administration's proposal to allocate five additional FC seats to DC members on the ground that as some DC members were returned from a constituency area with a small electorate or returned

uncontested, some of them might focus on the interests of their districts only. Moreover, DC members who wished to become DC FC Members might try to bring up more issues relating to LegCo business for discussion in DCs, resulting in a dilution of the functions of DCs.

12. The Administration explained that the six DC members who wished to become LegCo Members were expected to have a broader perspective in order to seek support from the 405 elected DC members who had a public mandate. While DC members might bring district matters into LegCo, they had to pay regard to the well-being of Hong Kong people as a whole when dealing with territory-wide issues. As it had been the Administration's established practice to consult DCs on major policy issues, there was no question of the functions of DC being diluted as a result of the addition of five DC FC seats.

13. Some members expressed the view that the Administration's proposal of enhancing the democratic elements of the Election Committee ("EC") through increasing the number of representatives of DCs to be elected from among elected DC members was far from satisfactory. They considered that all 405 elected DC members should be included in EC. These members further requested the Administration's assurance that the CE election in 2017 would be a contested one.

14. The Administration reiterated that its proposal would enhance the representativeness of EC and maintain the principle of balanced participation, which would help transform EC into the nominating committee when universal suffrage for CE was implemented in 2017. Under BL45, the nomination mechanism for the selection of CE by universal suffrage must be conducted in accordance with democratic procedures. The NPCSC Decision had already made it clear that the election of CE in 2017 would be implemented by universal suffrage under the one-person-one-vote system.

2010 LegCo By-election for the five GCs

15. A LegCo Member from each of the five GCs resigned on 29 January 2010 for the purpose of initiating a so-called "referendum campaign" via a by-election. The Administration explained to the Panel that BL did not provide for any referendum mechanism. Conducting any form of so-called "referendum" in Hong Kong would have no legal basis or effect under BL and the legislation of Hong Kong, and would not be recognized by the Government. However, the Administration had to discharge its statutory duties to arrange a by-election to fill the vacancies in the membership of LegCo. The Administration briefed the Panel on its plan for conducting the 2010 By-election. The Panel also discussed the related practical arrangements.

16. Some members expressed a strong view against the resignation of the five GC Members for the purpose of initiating the so-called "referendum campaign" via the By-election which, they considered, was a waste of public money and time for the community, as well as an abuse of the electoral system. These members pointed out that opinion polls conducted by tertiary institutions had indicated that the community

had reservations about the move of these five LegCo Members. According to a poll conducted by the University of Hong Kong, about 58% of the respondents opposed the move. In a survey conducted by Hong Kong Shue Yan University, 57% of the respondents opposed the move and 73% of the respondents considered conducting the By-election a waste of public money. They stressed that as a special administrative region of the People's Republic of China, HKSAR had no authority to determine or change its political structure on its own, or to create a referendum mechanism.

17. Some other members took the view that the purpose of the resignation of the five GC Members was to trigger a "de facto referendum" so that every citizen could express one's view under the theme of "implementation of genuine universal suffrage and abolition of FCs as soon as possible" by voting in the By-election, whereby public opinion could be quantified. As BL 45 and BL 68 stipulated that the electoral methods for the CE election and LegCo election respectively should develop in the light of the actual situation in Hong Kong, the referendum campaign would provide the most scientific way to find out the actual situation of Hong Kong.

18. The Administration emphasized that the Government was obliged to discharging its statutory duty to arrange the By-election in order to ensure that the views of Hong Kong people were fully represented in LegCo. The NPCSC Decision had already provided a timetable for HKSAR to implement universal suffrage. Conducting the so-called "referendum campaign" on the issue of constitutional development was not consistent with the provisions in BL relating to amendments to the two electoral methods and the interpretation made by NPCSC on 6 April 2004 and the NPCSC Decision.

19. Noting that the estimated expenditure for the LegCo By-election was \$159 million and the provisions would be reflected mainly in the draft estimates for 2010-2011 of the Registration and Electoral Office ("REO"), some members expressed dissatisfaction that the Administration had bundled the expenditure for conducting the By-election with the REO's draft estimates for 2010-2011, instead of submitting a separate financial proposal for the approval of the Finance Committee. They considered that it was inappropriate and unfair for the Administration to do so as Members would be deprived of the opportunity to indicate their stance and those of their electors by voting for or against the proposal.

20. Some other members took the view that a by-election was required by law to be conducted whenever a vacancy arose in the membership of LegCo. The Administration had the constitutional duty to arrange a by-election whenever a vacancy arose in the membership of LegCo.

21. The Administration explained that section 12 of the Electoral Affairs Commission ("EAC") Ordinance (Cap. 541) specified that all expenses incurred by EAC in the performance of its function should be payable out of the general revenue. In line with the established practice, provisions for conducting elections/by-elections would be included in the annual estimates of REO's Head of Expenditure.

22. Some members considered that to prevent abuse of the electoral system, there was a need to amend section 14 of the Legislative Council Ordinance (Cap. 542) ("LCO") to restrict the condition under which a Member who resigned from one's office could stand for election in the by-election to fill that vacancy.

23. The Administration advised that it noted members' concern and was exploring means to prevent abuse of the electoral system. If the Package of Proposals for the Methods for Selecting CE and for Forming LegCo in 2012 was endorsed by Members and the legislative process to amend Annexes I and II to BL could be completed before the end of the current legislative session, amendments to LCO, if any, to that effect could be considered when the Administration introduced local legislation in the autumn of 2010 to implement the two electoral methods.

24. The Panel passed a motion expressing the views that it was a waste of public money to spend \$159 million to arrange for the LegCo By-election arising from the resignation of the five LegCo Members; that the so-called 'referendum' was inconsistent with the procedures stipulated in BL on amending the methods for selecting CE and for forming the LegCo; and that the HKSAR Government should amend LCO to prevent the system regarding the resignation of LegCo Members and by-elections from being abused again in future.

25. Members noted that around 50 venues out of the 532 polling stations which were set up in the 2008 LegCo Election would not be available for use in the 2010 LegCo By-election due to various reasons, such as the venues being under renovation or activities having already been scheduled on the polling day. Some members expressed concern that as some of the polling stations in the LegCo By-election would be different from those in the 2008 LegCo General Election, it would cause confusion to electors. Moreover, electors would be discouraged to vote if the newly designated polling stations were not easily accessible.

26. The Administration advised that REO had succeeded in securing 38 alternative venues in the neighbouring areas which were largely accessible to the public. For the 17 polling stations for which alternative venues could not be identified, about 50 000 affected electors would be allocated to the nearest polling station and the poll card to be sent to each elector would specify the location of the polling station to which an elector was allocated.

27. Since the LegCo By-election would be the first time for imprisoned persons who were registered electors to vote in a territory-wide election, some members enquired about the relevant polling arrangements and urged the Administration to ensure that such arrangements would be made smoothly. The Administration explained that a dedicated polling stations ("DPS") would be set up at every penal institution which had imprisoned registered electors. The Administration planned to set up 23 DPSs at the penal institutions of the Correctional Services Department ("CSD") for about 1 000 registered electors imprisoned or remanded under the custody of CSD. Four DPSs would also be set up at police stations across the territory for registered electors who were remanded or detained on the polling day by law enforcement agencies to cast their votes. REO would liaise closely with CSD for any update on the list of prisoner-electors.

28. At the House Committee meeting on 5 March 2010, some Members expressed concern about the notice given by the Administration to incumbent LegCo Members and DC members for the removal of publicity signboards displayed at allocated public spots to make way for the designated display spots for candidates of the 2010 LegCo By-election to display their election advertisement. The Panel held a discussion with the Administration to review the removal arrangement.

29. Members noted that under the current removal arrangement, before each LegCo general election and DC ordinary election, REO would seek the assistance of the relevant Departments to revoke all approvals previously given to persons and organizations to display publicity materials on Government land and premises, including roadside railings on Government land. The persons and organizations concerned were required to remove the publicity materials at their own costs before a deadline specified by the Departments. Such an arrangement also applied to by-elections in respect of all the publicity spots in the relevant constituency.

30. Some members reiterated their dissatisfaction with the need to hold the LegCo By-election arising from the resignation of the five Members. They considered that the Administration should have considered the sentiment of the community towards the LegCo By-election and should not have initiated the removal arrangement in the first place. These members were of the view that incumbent LegCo Members and DC members should be allowed to keep the allocated public display spots during the LegCo By-election period, but necessary safeguards should be put in place to ensure fairness of the By-election. They pointed out that unlike previous by-elections, the LegCo By-election covered all 5 GCs. If incumbent LegCo Members and DC members had to remove all the publicity materials at allocated public display spots, it would deprive them of the means to communicate with the public during the by-election period. The removal of publicity materials would seriously affect their normal work and the subsequent reinstatement of the publicity materials would also lead to a waste of resources.

31. Some other members take the view that the status quo of the removal arrangement should be maintained, i.e. to continue to require all persons and organizations, including incumbent LegCo Members and DC members, to remove their publicity materials displayed at the allocated public display spots. They said that the removal arrangement had been a long-standing practice which had been applied in all previous by-elections without exception and proven to be fair. The Administration should not depart from a long-standing practice in a rush as it could be subject to legal challenge about the fairness of the LegCo By-election.

32. The Administration stressed that the crux of the problem was how to strike a balance between maintaining the regular communication between the incumbent LegCo Members and DC members and their constituency on the one hand and allowing adequate publicity opportunities for candidates in the LegCo By-election on the other hand. Any change to the existing practice would apply to future by-elections.

33. The Administration subsequently decided to allow incumbent LegCo Members and DC members (except those who stood for the LegCo By-election) who intended to

use the public display spots already allocated to them to continue to use the spots to communicate with the public during the LegCo By-election period. However, such spots could not be used for the purpose of promoting or prejudicing the election of any candidate in the By-election.

Political Appointment System

System of declaration of interests by CE and Officials under the Political Appointment System

34. Following the CE's announcement in his Policy Address 2009-2010 of the proposed distribution of cash coupons for compact fluorescent lamps to residential electricity account holders, there were media reports that CE's in-law was engaged in light bulb business. In the light of the community's concern about possible potential conflict of interest, the Panel discussed with the Administration the system of declaration of interests by CE and Officials under the Political Appointment System.

35. Some members were of the view that while it was unreasonable to expect the system of declaration of interests to cover all relatives, CE should declare any potential conflict of interest he was aware of to Executive Council ("ExCo") for record in order to avoid arousing any suspicion of dishonesty or unfairness. They considered that there was a need to improve the declaration system, and to review the extent to which the declaration should cover. These members stressed that CE should be alert to the need to declare any potential conflict of interest that a policy might entail notwithstanding the aim of the policy for protecting public interest. Given his position as head of the Government, the public would have a high expectation of his integrity. Some other members, however, considered that while there should be a declaration system to avoid transfer of benefits and to ensure accountability, it would discourage people from pursuing a career in politics if the declaration system was made too stringent.

36. The Administration advised that CE as the President of ExCo had, similar to other ExCo Members, declared his interests in "The Register of Interests of Members of ExCo" for the purpose of public inspection. The Code for Officials under the Political Appointment System ("the Code") applied to all politically appointed officials who were required to declare their investments and interests. The Code covered not only "actual" conflict of interest, but also "potential" conflict of interest. As to whether a certain interest would constitute any "potential" conflict of interest would depend much on the circumstances of each case. The Administration stressed that a balance had to be struck between maintaining a system to prevent conflict of interest and respecting the privacy of the politically appointed officials and their family members. The current system regarding declaration of investments and interests was effective and transparent.

Appointment of Under Secretaries

37. Following the appointment of two new Under Secretaries both with civil service background, some members queried whether the appointment was consistent with the objective of the further development of the Political Appointment System which sought

to provide more opportunities for aspirants from diverse backgrounds to gain experience and knowledge in government operations. They also expressed concern that the performance of some Under Secretaries had not been satisfactory. These members considered that the Administration should enhance the transparency of the appointment process of political appointees, as they were highly paid position funded by public money. They suggested that the Administration should ensure that at least either the Director of Bureau or the Under Secretary of a Bureau had expertise in the relevant policy area.

38. The Administration explained that the current political team of Principal Officials ("POs"), Under Secretaries and Political Assistants comprised persons from different backgrounds. While a number of the serving POs had civil service background, only two of the 18 serving Under Secretaries and Political Assistants were former civil servants, with the rest coming from such diverse backgrounds as academic, media, business and professional backgrounds. The Administration would consider nominations and referrals received from different sources as well as self-nominations for the appointment of political appointees. All appointments to the political positions were made under the principle of meritocracy having regard to the requirements of the position concerned. The Administration further advised that an assessment would be conducted in mid-2010 on the performance of the Under Secretaries and Political Assistants by the Directors of Bureau concerned. On the basis of the assessment, a decision would be made on whether any adjustment would be made to the salaries of individual Under Secretaries and Political Assistants, and any adjustments made to their salaries would be made public.

Reports under international human rights treaties

International Convention on the Elimination of All Forms of Racial Discrimination

39. After consideration of the HKSAR's second report under the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), the United Nations Committee on the Elimination of Racial Discrimination ("UNCERD") issued its Concluding Observations on 28 August 2009. The Panel discussed with the Administration and received views from deputations on the recommendations made in the Concluding Observations.

40. Some members expressed dissatisfaction that the Administration had refused to implement the UNCERD's recommendations that the HKSAR Government should extend the scope of the application of the Race Discrimination Ordinance (Cap. 602) ("RDO") to all Government functions and powers, and adopt a race equality plan to ensure effective implementation of RDO. They also considered that the definition of race discrimination in RDO was too narrow and out-dated compared to the definition and standards adopted in the European Union Directive to combat race discrimination. These members pointed out that in the absence of legislation to bind the Government beyond the limited scope of RDO, taking legal action against the Government under the Hong Kong Bill of Rights Ordinance (Cap. 383) ("BORO") would not only be expensive and time-consuming, but also ineffective.

41. The Administration advised that the relevant BL provisions and BORO prohibited the Government and public authorities from engaging in practices that would entail any form of discrimination including race discrimination. RDO applied equally to the Government as well as the private sector in areas specified in the Ordinance. RDO would not narrow the scope of application of BORO to the Government, nor would it absolve the Government and public authorities from its obligations under BORO. The Administration maintained its view that ICERD contained no express provision for State Parties to adopt a race equality plan.

42. Some members expressed concern whether the measures and resources available to assist non-Chinese speaking ("NCS") students in learning Chinese and whether the measures implemented by the Education Bureau ("EDB") to facilitate integration of NCS students into the local education system were effective. The Administration informed the Panel that the number of designated schools for NCS students, which were provided with focused support and a recurrent special grant to support the NCS students, had increased from 15 in the 2006-2007 school year to a total of 26 in the 2009-2010 school year. The after-school support services for NCS students had been reinforced through the establishment of more Chinese Language Learning Support Centres, and the number of venues of the Centres had increased from the initial five to 10 in the 2009-2010 school year. EDB had visited schools with larger NCS intakes for collecting information on the effectiveness of the school curriculum and various support. Members noted that the Panel on Education would further follow up on the support measures for the education of NCS students.

43. Some members expressed regret that despite the fact that discrimination against new arrivals from the Mainland was prevalent, the issue would not be covered under the scope of RDO. They considered that the Administration should have done more to address the problem and provide adequate avenue for these new arrivals to seek redress. The Administration explained that the protection under RDO applied to new arrivals from the Mainland and all other persons in Hong Kong. As the Administration appreciated the difficulties faced by some new arrivals to adapt to the life-style of a new environment, the Home Affairs Department, as the co-ordinator, had liaised with various government Departments to provide different support services for new arrivals.

International Covenant on Economic, Social and Cultural Rights

44. The Panel discussed the outline of topics in the third report of HKSAR under International Covenant on Economic, Social and Cultural Rights ("ICESCR") with the Administration. The Panel further received views from the public on the outline of topics.

45. Some members expressed concern that according to BL39, the provisions of ICESCR and international labour conventions as applied to Hong Kong should remain in force and be implemented through the laws of HKSAR, but the Administration had not enacted domestic legislation to entrench ICESCR. Some other members expressed the view that as Article 2(1) of ICESCR did not require the implementation of the rights guaranteed in the Covenant in one go, the Administration should enact law only when

needed, taking into account public aspirations and the local circumstances. According to the Administration, although HKSAR had not specifically enacted a single piece of legislation to implement ICESCR, as in the case of International Convention on Civil and Political Rights ("ICCPR"), the rights enshrined in ICESCR were protected by BL and other domestic law.

46. Some members expressed concern that the Administration had not introduced a bill on collective bargaining despite the trade unions' repeated requests. They considered that the Administration should reflect the situation in the third HKSAR report. The Administration advised that it had already explained to the relevant UN Committee that imposing collective bargaining by statute would have long-term implications on Hong Kong's labour relations system and could affect adversely Hong Kong's economic competitiveness. Given the predominance of small and medium enterprises which accounted for 98% of the companies in Hong Kong, the Government considered such law inappropriate for Hong Kong. The Administration would cover in the third HKSAR report progress made by the Administration since its last report, the aspiration of trade unions and how the Administration implemented measures to facilitate effective communication between employers and employees at the enterprise level.

47. Some members considered that the Administration should also justify its refusal to introduce legislation to outlaw discrimination on the ground of sexual orientation and reflect the growing wide income disparity in the territory in its third report. The Administration undertook to reflect in the report its position on protection for people with a different sexual orientation. The Administration further advised that a pragmatic and multi-pronged approach was adopted to tackle poverty and to assist the disadvantaged groups. Apart from providing financial assistance, the Administration provided training and retraining opportunities with a view to enhancing the skills and competitiveness of the disadvantaged groups.

United Nations Convention on the Rights of Persons with Disabilities

48. The United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD") entered into force for the People's Republic of China, including HKSAR, since 31 August 2008. The Panel discussed with the Administration and received views from deputations on the outline of topics in the initial report to be submitted by HKSAR on measures taken to give effect to HKSAR's obligations under the Convention.

49. Some members noted the concern of the Equal Opportunities Commission ("EOC") that the broad definition of "disability" in the Disability Discrimination Ordinance (Cap. 487) ("DDO") had led to government Bureaux and Departments adopting different definitions of disability under their respective policy purviews to suit their respective scope of services provided to persons with disabilities ("PWDs"). As such, the Government's approach had failed to address fully the needs of PWDs. They enquired whether the Administration would consider adopting the new International Classification of Functioning, Disability and Health introduced by the World Health

Organization under which disability and health were classified from body, individual and societal perspectives.

50. The Administration admitted that the definition of "disability" was very broad under DDO which included persons who were physically and mentally impaired at present, in the past and possibly in the future. The Administration's explanation was that its policy intention in adopting a broad definition of "disability" under DDO was to provide the widest possible protection to PWDs. Given its wide coverage, government Bureaux and Departments had to, on a pragmatic level, adopt their own definitions of "disability" taking into account the scope of services provided and the needs of PWDs under respective policy areas. The Labour and Welfare Bureau, which was responsible for co-ordinating the overall implementation of UNCRPD, would review the measures for rehabilitation and welfare services for PWDs from time to time. The Administration further advised that since the new International Classification of Functioning, Disability and Health had been advocated by the World Health Organization some 10 years ago, no country had successfully applied the classification in law because of technical problems and complications. Nevertheless, the Administration would keep in view the world trend and make changes as and when necessary.

51. Some members shared the deputations' concern about the inadequacy of barrier-free access facilities for PWDs. They considered that Hong Kong lagged behind in the provision of barrier-free facilities for PWDs, particularly in respect of providing health care services, in comparison with those in developed countries. These members were also concerned about the long-standing problem of inadequate barrier-free access to polling stations. They asked whether the Administration could undertake to provide polling stations with 100% barrier-free access facilities to PWDs in future elections.

52. The Administration informed the Panel that the Hospital Authority had in recent years carried out improvement works for hospitals and provided new facilities and services that were more accessible to PWDs. The Financial Secretary had also earmarked provisions for four additional new Rehabuses in the coming year. In addition, the Administration would pilot home care services for persons with severe disabilities in Kwun Tong and Tuen Mun with a view to alleviating their travelling problem. On the problem of barrier-free access to polling stations, the Administration advised that REO had been putting in place various measures to ensure that PWDs could exercise their voting right in elections. In identifying venues for use as polling stations, REO would arrange for venues accessible to PWDs as far as practicable. If there was no other suitable choice and a venue which was not readily accessible to PWDs had to be used, REO would try to provide, where circumstances permitted, temporary ramps to increase the accessibility of the polling stations to PWDs. The Administration assured members that REO would make the best endeavour to identify polling stations which could be easily accessible to PWDs.

53. Some members expressed concern that the Commissioner for Rehabilitation at his present rank might not be able to steer government Bureaux and Departments

towards addressing the problem of mental health. They considered that the Administration should consider setting up a Mental Health Council. The Administration advised that the scope of services provided for promoting mental health included in-patient service, specialist outpatient service, day hospital, community outreach service, and follow-up by community psychiatric nurses. The Social Welfare Department also rendered assistance to cater for the needs of persons with mental health problems in respect of housing, training and rehabilitation. The above services were delivered through cross-sectoral and multi-disciplinary co-ordination by the Food and Health Bureau under the leadership of the Secretary for Food and Health.

International Convention on Civil and Political Rights

54. The Panel discussed with the Administration and received views from the public on the outline of topics to be covered in the third report of HKSAR to be submitted in the light of ICCPR. Some members expressed concern that the constitutional reform package put forward by the Administration for selecting CE and for forming LegCo in 2012 did not conform to Article 25 of ICCPR. They reiterated that the United Nations Human Rights Committee ("UNHRC") had repeatedly pointed out that once an elected LegCo was established, its election had to conform to Article 25 of ICCPR. These members considered that the Administration's reliance on the reservation made in respect of Article 25(b) to justify the non-compliance of the electoral system for the formation of LegCo with that provision was not legally sound. In addition, the provisions of ICCPR including Article 25 have been incorporated in the laws of Hong Kong by way of BORO. They requested the Administration to explain in the third report as to whether its definition of the principles of universality and equality was different from that held by UNHRC.

55. The Administration's position was that CPG notified the United Nations Secretary General in June 1997 that the provisions of ICCPR as applied to Hong Kong would remain in force beginning 1 July 1997. In other words, those provisions which did not apply to Hong Kong (including Article 25(b) of ICCPR for which a reservation had been made by the United Kingdom Government in 1976) would also not be applied to HKSAR. In the case of *Chan Yu Nam v Secretary for Justice* (HCAL32/2009 and HCAL55/2009) in 2009, the High Court had ruled that such reservation continued to apply to HKSAR. It would be for the community to discuss the specific model for implementing universal suffrage for forming LegCo. The Administration also explained that Article 21 of BORO mirrored Article 25 of ICCPR and the reservation made in respect of Article 25(b) was specifically provided for in section 13 of BORO.

56. Members also raised various issues of concern including the Administration's refusal to set up an independent human rights institution, the relatively small number of women in public office, and inadequate assistance for Hong Kong residents in distress outside Hong Kong. On the setting up of an independent human rights institution, the Administration's position was that there already existed in Hong Kong an extensive mechanism for the protection of human rights. The rights of individuals were enshrined clearly in the laws. The effectiveness of the existing mechanism and the work of the Government and these bodies were continually and closely monitored by

LegCo and the public, including particularly the media. The Administration did not see the need for setting up such an institution. The Administration undertook to reflect the significant developments in the relevant areas in the third report.

Equal opportunities on the grounds of race, sexual orientation and gender identity

Promotion of racial equality

57. During the last legislative session, the Administration consulted the Panel on the draft Administrative Guidelines on Promotion of Racial Equality which sought to provide guidance to relevant Bureaux, Departments and public authorities to promote racial equality and ensure equal access to key public service areas. The Panel since then monitored closely the implementation progress and received updates from the Administration on the draft checklists of measures drawn up by relevant Bureaux, Departments and public authorities under the Administrative Guidelines, which covered areas of education, vocational training, medical and health, employment and community services.

58. Some members queried the effectiveness of the Administrative Guidelines to promote racial equality on the grounds that the draft Guidelines which were couched in abstract and broad terms would be implemented on a voluntary basis only, and a high-level monitoring mechanism led by CS had not been set up to ensure compliance within the Government. The Administration explained that under the Policy Committee led by CS, all relevant policy secretaries were aware of the need to implement the Administrative Guidelines. Relevant Bureaux, Departments and public authorities had the obligation to comply with the Administrative Guidelines even though it was not legally binding for them to do so. The Ombudsman was empowered to investigate maladministration cases of relevant Bureaux and Departments in relation to failure to apply government administrative guidelines, including the Administrative Guidelines, within the confines of The Ombudsman Ordinance (Cap. 397). The Constitutional and Mainland Affairs Bureau would maintain an overview on the implementation of the Administrative Guidelines within the Government and report progress to the Panel as appropriate. The Administration also undertook to take into account members' views in refining the Guidelines.

59. Some members reiterated their concern as to whether the Secretary for Constitutional and Mainland Affairs had the authority to press other policy secretaries to implement measures to promote racial equality as implementation of the Administrative Guidelines would involve various policy areas. They maintained that it was necessary to set up a high-level monitoring mechanism to be led by CS in order to ensure that the implementation of RDO including the Administrative Guidelines would achieve effective results.

60. Some members also expressed concern whether adequate resources would be provided to individual Bureaux and Departments for implementing the Administrative Guidelines. They considered that the Administration should review the overall requirement for additional resources to implement RDO including the Administrative Guidelines and undertake to provide for the financial commitment accordingly.

61. The Administration assured the Panel that it would strive to provide the resources to meet the bid for additional funding, where necessary, from relevant Policy Bureaux/Departments for the financial year 2010-2011 for the implementation of RDO and the Administrative Guidelines. At the Panel's request, the Administration undertook to consult relevant Bureaux and Departments on the adequacy of manpower and funding for providing support services for ethnic minorities and to keep the Guidelines and checklists under review. The Panel would continue to monitor the implementation progress.

62. The Panel also received an update by the Administration on the operation of the four support service centres for ethnic minorities located in Kwun Tong, Wan Chai, Tuen Mun and Yuen Long respectively. Members noted that the four centres which had commenced operation in phases from May to September 2009 provided language classes in Cantonese and English, cultural and community programmes, counseling and referral services, and other integration programmes for ethnic minorities to facilitate their integration into the community and access to public services. Members also noted that after-school tutorial classes were provided by the operators of three of the support service centres at the venues of the respective NGOs and religious centres. Operators of two support service centres also organized after-school tutorial classes in non-designated schools in districts including Tuen Mun, Yuen Long and Tin Shui Wai. NCS students from other non-designated schools or districts could also attend these classes.

63. Some members pointed out that the number of NCS students taking classes in the four support service centres and in non-designated schools was few as compared with the ethnic minority population. They queried whether the operational funding of up to \$700,000 for the 2009-2010 school year and up to \$1.4 million for the 2010-2011 school year for after-school tutorial classes was adequate. Members considered that the Administration should assess the adequacy and effectiveness of the services provided to ethnic minorities and review how their needs could be better met in the future.

64. The Administration explained that in addition to the provision for after-school tutorial classes for NCS students provided by the support services centres, EDB had earmarked sufficient provision to cater for the educational needs of NCS students which included, among others, the special grant for designated schools given at the range of \$300,000 to \$600,000 per school per annum. The Administration would monitor the operation and performance of the four support service centres through gathering feedbacks from the community and other monitoring mechanisms. The Administration also assured the Panel that it would keep under review the support services and consider necessary adjustment in the light of the operational experience and the needs of ethnic minority communities.

Promotion of equal opportunities on the grounds of sexual orientation and gender identity

65. The Panel discussed the measures taken by the Administration to promote equal opportunities in relation to sexual orientation and gender identity. The Administration advised the Panel that programmes were developed for school heads, teachers and

students to ensure that students were taught on correct values and attitudes towards schoolmates with a different sexual orientation. The Hong Kong school curriculum had been revised and updated to provide opportunities for students to develop concepts and values in relation to non-discrimination, equal opportunities, respect for others and harmonious relationships.

66. Some members were dissatisfied that the education and promotion programmes carried out by the Administration were too generic which, they considered, could not eliminate effectively discrimination on the ground of sexual orientation. They also considered that adequate educational effort had not been made at schools. Some other members were of the view that while the rights of sexual minorities should be protected, the society at large upheld the traditional family values and moral standards. They cautioned that educational effort in relation to sexual orientation should be made from the angle of eliminating discrimination and not promoting the understanding of sexual orientation. The Administration assured members that it was aware that religious groups, parents, media and the public were concerned about the sensitivity of the subject. The Administration was committed to promoting equal opportunities for all and did not seek to promote homosexual behaviour.

67. On the work undertaken by the Administration to eliminate discrimination on the ground of sexual orientation in the area of employment, the Administration advised that employers were encouraged to follow the practices set out in the Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation to ensure equal opportunities in employment. Discussion sessions were held with employers, companies and associations of human resources managers to promote understanding of the responsibilities of employers to ensure equal opportunities in employment. Some members commented that people with a different sexual orientation would have the best protection in employment if an employer did not have the right to enquire into the sexual preference of the employees.

68. Some members were of the view that the Administration should introduce legislation against discrimination on the ground of sexual orientation. They stressed that legislation might well be an educational tool to cultivate in the community a proper attitude towards sexual minorities. These members suggested that while the recognition of homosexual marriages was controversial, the Administration should consider legislating against discrimination on the ground of sexual orientation in specific areas as an initial step. Some other members considered that legislation was not the only means to resolve discrimination on the ground of sexual orientation. They considered administrative measures and public education equally effective in combating discriminatory acts in this regard.

69. The Administration's view was that given the diverse views in the community on the need for introducing legislation to prohibit discrimination against people on the ground of sexual orientation, it was not the appropriate time to consider the question of introducing legislation. The Administration would pay attention to social development and enhance administrative measures to eliminate discrimination on the ground of sexual orientation in the community.

Work of the Equal Opportunities Commission

70. Following the Government's announcement of the appointment of Mr LAM Woon-kwong as the new Chairperson of EOC, the Panel invited the new Chairperson to brief members on his vision and the work of EOC. Members pointed out that EOC had experienced a spate of incidents in recent years which affected adversely the credibility of EOC and non-government organizations ("NGOs") were disappointed at the work of EOC and were of the view that EOC had confined itself to the enforcement of the anti-discrimination ordinances. Members asked the newly appointed Chairperson of EOC as to how EOC could regain public confidence in its work of promoting equal opportunities.

71. The Chairperson of EOC stressed that EOC should be an advocate of equal opportunities, not merely a law enforcement agency. EOC should promote and disseminate the values of equal opportunities and anti-discrimination throughout society which would be a long-term task requiring the concerted efforts of NGOs and the Government.

72. Members in general supported the mission statement made by the Chairperson of EOC to promote awareness, understanding and acceptance of diversity and equal opportunities and provide education to prevent discrimination. They, however, pointed out that the public were concerned whether the Chairperson of EOC, a former politically appointed principal official under the accountability system, could be truly independent and fair in discharging EOC's functions. Members also enquired whether EOC would enhance its transparency by opening up its meetings to the public.

73. The Chairperson of EOC assured members that EOC would operate independently even though it was subvented by the Government. As the Chairperson, he would discharge his duty without fear and favour. He advised that the Commission would discuss at its next meeting whether the meetings of EOC should be opened up, and if so, to what extent. At present, the minutes of meetings of the Commission would be made accessible by the public on its website.

74. Members also expressed concern that the EOC's funding for providing legal assistance was insufficient to enable the Commission to discharge its duty effectively. The Chairman of EOC advised that according to past statistics, many of the cases had been resolved by conciliation before legal proceedings were initiated. Of the cases taken to court, the legal expenses incurred by EOC were affordable and most of the trials had resulted in favour of EOC-assisted parties. He assured members that for meritorious cases which involved a question of principle, EOC would take them to court as long as there were sufficient evidence and a need to enhance and sustain public awareness.

75. Following the EOC's publication of the draft revised Code of Practice on Employment under DDO ("CoP on Employment") for public consultation, the Panel received a briefing by EOC and received views from the public on the draft revised CoP on Employment. Some members expressed concern whether barrier-free access facilities provided to PWDs in workplaces were adequate and enquired about the

responsibility of employers in the provision of reasonable accommodation to employees who had disabilities.

76. EOC explained that provision of barrier-free access facilities was not the sole responsibility of employers as developers and owners of commercial buildings also had their role to play. Under the provision of the CoP on Employment, an employer had the responsibility to provide reasonable accommodation to an employee with a disability to fulfill the inherent requirements of a job. 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 court would tend to look into whether services or facilities had been considered or reasonably afforded to the employee with a disability.

77. Members made various comments on the draft revised CoP on Employment with a view to enhancing its readability and consistency. They stressed that the CoP on Employment which had been in use for 13 years should be made easily understood and user-friendly to employers and employees so that it would be effective in providing guidance to employers in Hong Kong on implementing equality of opportunities between PWDs and those without. EOC advised that the draft revised CoP on Employment provided precedent cases to help people understand important concepts in DDO and thereby follow the spirit of equal opportunities enshrined in DDO. EOC intended to update the CoP on Employment every two to three years and would further refine the draft revised version to enhance its comprehensibility.

Protection of personal data

78. The Panel continued to monitor closely the work of the Office of the Privacy Commissioner for Personal Data ("PCPD") for the protection of personal data privacy. The Panel received a report by the Privacy Commissioner on his work during his term of office and on the progress of work undertaken by his Office in response to the conclusions and recommendations made in the Public Accounts Committee's No. 53 Report in respect of PCPD.

79. Some members reiterated their concern about the resource constraints faced by PCPD. They considered that due to the lack of manpower resources and increasing caseload, PCPD was unable to handle the influx of complaints arising from the spate of personal data leakages by government Bureaux/Departments, the Hospital Authority and banks in recent years.

80. The Administration advised that the Government was firmly committed to the protection of personal data privacy and would strive to provide resources at an appropriate level to support PCPD for effective enforcement of Personal Data (Privacy) Ordinance (Cap. 486). Since the Constitutional and Mainland Affairs Bureau took over from the Home Affairs Bureau as the housekeeping bureau of PCPD in July 2007, the provision for PCPD had increased from \$36.2 million in 2007-2008 to \$48.6 million in 2010-2011, representing an increase of 34% during this period. An additional provision of \$4.57 million had been earmarked for PCPD in 2010-2011 to step up

enforcement and promotion work. Members noted that PCPD would also conduct a post-implementation review with a view to streamlining the procedures to handle complaint cases.

Code on Access to Information and management of public records

81. Following the release of The Ombudsman's Direct Investigation Report on Administration of Code on Access to Information ("the AI Code") in January 2010, the Administration briefed the Panel on the follow-up actions it had taken in response to the observations and recommendations made in the Report. The Panel also took the opportunity to discuss and receive public views on the AI Code and management of public records.

82. 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 AI 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. Under the current government structure, the Government Records Service ("GRS") was tasked to oversee the management of government records on a government-wide basis.

83. Some members were of the view that the existing framework for access to information was ineffective. They criticized the scope of information to which public access might be refused as set out in the AI Code as being too broad and unclear. These members urged the Administration to review and confine the scope. They also considered that there should be an independent monitoring mechanism over compliance with the AI Code. The Administration 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. 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. The Administration stressed that the implementation of the AI Code was monitored by The Ombudsman. The Administration attached great importance to the work of The Ombudsman in monitoring the administration of the AI Code and would ensure appropriate follow-up actions on The Ombudsman's recommendations.

84. Some members expressed concern whether GRS had the power to ensure proper management of public records by government Bureaux and Departments, as well as the professional capacity to perform its role effectively. The Administration advised that apart from executive grade staff members who were responsible for implementing policies for the management of public records, curators in GRS were responsible for preserving government records and providing a secure and controlled environment for the protection of archival materials for permanent preservation, and archivists were responsible for overseeing the daily operation of the Public Records Office, identifying and acquiring government records having archival value.

85. Some members shared the strong view expressed by deputations that the Administration should enact archival and freedom of information legislation to ensure proper management of records and their availability for public access. The Administration maintained that the basic principles for records management as adopted by overseas jurisdictions were already embedded in the administrative framework set by GRS and the present records management system was functioning effectively. It did not see the need for records legislation for the time being. The Administration also considered that 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. Some members stressed that many organizations in the community had studied and researched on archives law and freedom of information law for many years, and the Administration should maintain a dialogue with these organizations and consider seriously their views and suggestions.

PANEL MEETINGS

86. From October 2009 to June 2010, the Panel held a total of 14 meetings.

Council Business Division 2
Legislative Council Secretariat
30 June 2010

Legislative Council

Panel on Constitutional Affairs

Terms of Reference

1. To monitor and examine Government policies and issues of public concern relating to implementation of the Joint Declaration and the Basic Law, relations between the Hong Kong Special Administrative Region Government and the Central People's Government and other Mainland authorities, electoral matters, district organizations, human rights, personal data protection and press freedom.
2. To provide a forum for the exchange and dissemination of views on the above policy matters.
3. To receive briefings and to formulate views on any major legislative or financial proposals in the above policy areas prior to their formal introduction to the Council or Finance Committee.
4. To monitor and examine, to the extent it considers necessary, the above policy matters referred to it by a member of the Panel or by the House Committee.
5. To make reports to the Council or to the House Committee as required by the Rules of Procedure.

Panel on Constitutional Affairs

Membership list

Chairman	Hon TAM Yiu-chung, GBS, JP
Deputy Chairman	Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Members	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 WONG Yung-kan, SBS, JP 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 Timothy FOK Tsun-ting, GBS, JP Hon Abraham SHEK Lai-him, SBS, JP Hon LI Fung-ying, SBS, 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 Hon Mrs Regina IP LAU Suk-ye, GBS, JP Dr Hon PAN Pey-chyou Hon Paul TSE Wai-chun Dr Hon Samson TAM Wai-ho, JP Hon Alan LEONG Kah-kit, SC (up to 28 January 2010) (rejoined on 19 May 2010)

Hon LEUNG Kwok-hung (up to 28 January 2010)
(rejoined on 18 May 2010)

Hon Tanya CHAN (up to 28 January 2010)
(rejoined on 18 May 2010)

Hon WONG Yuk-man (up to 28 January 2010)
(rejoined on 26 May 2010)

(Total : 39 members)

Clerk

Miss Flora TAI

Legal Advisers

Mr Arthur CHEUNG
Ms Clara TAM

Date

26 May 2010