

# 立法會

## *Legislative Council*

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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 2010-2011 Legislative Council ("LegCo") session. It will be tabled at the Council meeting of 13 July 2011 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 36 members, with Hon TAM Yiu-chung and Hon Mrs Sophie LEUNG LAU Yau-fun elected as Chairman and Deputy Chairman respectively. The membership of the Panel is in **Appendix II**.

#### **Major work**

##### Constitutional development

4. Following the passage by LegCo by a two-thirds majority of the motions put forth by the HKSAR Government concerning the draft amendments to the methods for selecting the Chief Executive ("CE") and for forming LegCo in 2012 ("the two electoral methods") on 24 and 25 June 2010 respectively, the Panel held a special meeting to discuss the Administration's proposed arrangements under local legislation to implement the two electoral methods.

5. Some members were of the view that the nomination threshold for CE candidature in 2012 should be adjusted downwards in order to increase the pool of candidates. The Administration advised that when LegCo Members supported the motion on the amendments to Annex I to BL regarding the method for the election of CE in 2012, it was on the understanding that the nomination threshold for the CE election would be set at 150. The Administration would adhere to the electoral arrangements which were endorsed by LegCo Members.

6. Some members expressed concern that if the current bloc vote system was retained for the District Council ("DC") subsectors under the fourth sector of Election Committee ("EC"), dominant political parties among the elected DC membership could pocket all the 117 DC subsectors seats and could have an undue influence over the candidature of the CE election. These members considered that the proportional representation list system should be adopted for returning members to EC. Some other members, however, were of the view that the adoption of the bloc vote system would be fair to all political parties as all candidates in the DC subsectors would be nominated by elected DC members and only elected DC members were eligible for registration as voters.

7. The Administration explained that the "bloc vote system" was also adopted in the elections of other EC subsectors. As LegCo Members were also EC members, the Administration believed that both the pro-establishment and pan-democratic camps would be able to secure the required 150 nominations among 1 200 EC members to nominate a candidate for the 2012 CE election.

8. Noting that the number of members of EC would be increased from 800 to 1 200, some members considered that the Administration should allocate some of the new seats to some major trades/professions such as medium-sized enterprises, Chinese medical practitioners, real estate agents, youth and ethnic minorities to enhance the representativeness of EC.

9. The Administration, however, advised that the existing EC subsectors, which included many major trades/professions of Hong Kong, were broadly representative. Having considered the difficulty in and the time required for achieving a consensus on the generally accepted eligibility criteria for registration for any new subsectors, the Administration considered that it would be desirable to maintain the status quo of keeping the existing 32 subsectors.

10. Some members considered that the "one-person-two-votes" model for returning the five new DC Functional Constituency ("FC") (i.e. the DC (second) FC) seats represented a significant step forward in the constitutional development of Hong Kong. Some other members, however, criticized that there would be inequality among the right to vote, the right to nominate and the right to stand for election under such a model.

11. The Administration stressed that under the "one-person-two-votes" model for returning the new DC (second) FC seats in 2012, only elected DC members would be eligible to nominate and be nominated as a candidate and the candidates would be elected by a large electorate base of over 3.2 million registered electors. The Administration considered that democratic elements of the FC system would be enhanced.

12. Some members considered that the nomination threshold for the DC (second) FC should be adjusted to 10 instead of 15 as proposed by the Administration. Some other members, however, considered it appropriate to set the nomination threshold within the range of 10 to 20 and supported the proposed nomination threshold. The Administration explained that with the proposed nomination threshold, it was envisaged that the 412 elected members of the fourth term DC could nominate more than 20 lists of candidates which would enable different political parties and independent candidates to take part in the election to ensure competition.

13. The CE Election (Amendment) Bill 2010 and the LegCo (Amendment) Bill 2010 to implement the two electoral methods for 2012 were passed on 3 March and 5 March 2011 respectively.

#### Electoral and related matters

##### *Preparation for the upcoming elections*

14. Four elections, namely, the DC election, the EC subsector election, the CE election and the LegCo election would be held in November and December 2011, and March and September 2012 respectively. The Panel held discussions with the Administration on -

- (a) the review on the subsidy rate of the financial assistance for candidates and the election expenses limit for the 2011 DC election;
- (b) the review of election expenses limits for the EC subsector elections in December 2011 and the CE election in March 2012; and
- (c) the review of related practical electoral arrangements.

15. The Panel also received briefings from the Administration on -

- (a) the legislative proposals to amend nine Amendment Regulations made under the Electoral Affairs Commission ("EAC") Ordinance (Cap. 541) to prepare for these four upcoming elections;

- (b) a staffing proposal for creating one supernumerary post of Principal Executive Officer in the Registration and Electoral Office ("REO") for the preparation and conduct of these elections;
- (c) the main features of the 2011 voter registration campaign running from early June to 16 July 2011; and
- (d) the proposed publicity programme for the 2011 DC election.

*Financial assistance scheme and election expenses limit for the 2011 DC election*

16. Members in general were supportive of the Administration's proposal for increasing the subsidy rate for the DC election to the lower of \$12 per vote or 50% of the election expenses limit provided that the subsidy amount did not exceed the amount of the declared election expenses of a candidate. The Administration had initially proposed to increase the election expenses limit for the DC election to be held in November 2011 from \$48,000 to \$53,000, having taking into account the forecast inflation rate of 11% from 2008 to 2011. Some members urged the Administration to adjust the election expenses limit upward so as to better reflect the anticipated inflation. The Administration subsequently took into account the forecast inflation rate for 2011 and proposed to increase the election expenses limit accordingly by 12% to \$53,800 (rounded up to the nearest hundred).

17. Some members expressed reservations about the proposed increase of the election expenses limit, saying that it would put the less well-off candidates at a disadvantage. There was, however, another view that setting election expenses limit would hinder democratic development and the existing restrictions on the election expenses limit should be relaxed in order to encourage candidates from the business sector and professional sectors to participate in elections.

18. The Administration advised that the proposed increase in the election expenses limit had taken into account the spending pattern of candidates in the 2007 DC election and of those in the six recent DC by-elections, and the forecast cumulative inflation. The Administration considered that the election expenses limits in Hong Kong were set at a reasonable rather than a high level so that electioneering activities of resourceful political parties would not overshadow those of the political parties and independent candidates with less financial resources.

*Election expenses limit for the CE election*

19. Some members expressed support for the Administration's proposal for increasing the election expenses limit for the CE election from \$9.5 million to

\$13 million. They were of the view that the election expenses limit had not been revised in the last 10 years and the amount must be sufficient to enable CE candidates to solicit support from members of EC and to publicize their election platform to the public at large. Some other members, however, considered that the scale of the proposed increase was too large on the grounds that the CE election had a small electorate of 1 200 EC members, the election expenses incurred for the last CE-elect was \$8.36 million only and the increase in the Composite Consumer Price Index from 2000 to 2012 was only 12.8%.

20. According to the Administration, the proposed increase of the election expenses limit should provide sufficient resources to enable the CE candidates to conduct the necessary canvassing activities both territory-wide and at district level. As the CE Election (Amendment) Ordinance 2011 had amended the voting system for the CE election to the effect that a candidate shall only be elected if he or she obtained more than 600 valid votes, instead of the previous provision of half of the total number of valid votes cast, CE candidates would have to enhance their canvassing activities.

*Financial assistance scheme and election expenses limit for the 2012 LegCo election*

21. The amount payable as financial assistance in respect of a list of candidates/a candidate standing for the 2008 LegCo election was the lower of either the amount obtained by multiplying the total number of valid votes cast for the list of candidates/candidates by \$11 or 50% of the declared election expenses of the list of candidates. The Administration had initially proposed to increase the subsidy rate for the 2012 LegCo election from \$11 to \$12 per vote. Some members were of the view that the financial assistance should be increased from \$11 to at least \$20 per vote and that the cap on the financial assistance payable should be adjusted from 50% to 70%-80% of the declared election expenses.

22. Having regard to the views expressed by members, the Administration subsequently agreed to enhance the financial assistance scheme for the 2012 LegCo election by increasing the subsidy rate from \$11 to \$12 per vote and capping the amount of financial assistance payable at 50% of the election expenses limit, instead of the declared election expenses, provided that the subsidy amount did not exceed the amount of the declared election expenses of the candidates. According to the Administration, the new formula was fair as it reflected the level of support a list of candidates/a candidate received from the public and would provide more room for candidates to obtain financial assistance.

23. Some members were of the view that the maximum amount of election expenses limit for the DC (second) FC which was proposed by the Administration to be set at \$6 million was too high. They expressed strong

dissatisfaction that it would create unfairness in the participation of election as only well-off candidates could afford to stand for the election. These members urged the Administration to provide more assistance to candidates to facilitate their arrangements in publicity work for the election in order to alleviate their financial burden.

24. Some other members, however, considered that the Administration should set a higher election expenses limit for the DC (second) FC or remove any cap on the amount so that independent candidates from the business sector and professional sectors would be encouraged to participate in the election even though they lacked the manpower support from political parties. Some members took the view that while a high election expenses limit would put less well-off candidates at a disadvantage, a low election expenses limit would pose limitations to the candidates in running their election campaigns. They considered the maximum election expenses limit proposed by the Administration for the DC (second) FC appropriate.

25. The Administration advised that it had considered the proposals put forward by various political parties ranging from \$4 million to \$8 million. The election expenses limit for the DC (second) FC should not be set at a high level so that candidates from large or small political parties and independent candidates could participate in the election. Moreover, the election expenses could be shared by five candidates in a list. Independent candidates could also form a list with other parties to join the election to share out the cost.

#### *Practical electoral arrangements*

26. When the Administration consulted the Panel in reviewing the electoral arrangements in respect of the four elections to be held in 2011 and 2012, members in general called on the Administration to improve the arrangements for electors with a disability to access polling stations and introduce environmental-friendly measures in the distribution of election-related materials etc.

27. Many members pointed out that REO was responsible for checking a candidate's election return ("ER") and would refer any possible breach of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554), irrespective of how trivial it was, to the Independent Commission Against Corruption ("ICAC") for investigation. They expressed concern that candidates who were involved had to face considerable uncertainty as a result of the ICAC's investigation in such cases and some of them might need to incur a fairly large amount of legal costs to seek an order from the Court of First Instance ("CFI") to grant relief if election advertisements ("EAs") did not meet certain statutory requirements in the submission of their ERs. They also considered it a waste of public money.

28. Having regard to the strong views expressed by members, the Administration had subsequently agreed to introduce a Committee Stage amendment to amend the Electoral Arrangements (Miscellaneous Amendments) Bill 2011 which was under the scrutiny by LegCo for the purpose of introducing a de minimis arrangement for handling ERs with minor errors or omissions through appropriate legislative amendments.

29. Under the existing arrangements, a candidate or list of candidates of the DC, LegCo and EC subsector was entitled to send a letter free of postage to each elector/voter in the constituency or an EC subsector for which the candidate/list of candidates was nominated. However, the letter must relate to the election concerned and must comply with the requirements and limitations prescribed by the relevant EAC Regulations. Some members had strongly urged the Administration to take on board the suggestion previously made by Members that lists of candidates/candidates of different constituencies should be allowed to print their campaign materials in the same promotional letter to be sent free of postage. They stressed that it would enable political parties to enhance the campaign publicity for their lists of candidates/candidate at the same election and economize on paper.

30. After consideration of members' views, the Administration had subsequently introduced the Electoral Legislation (Miscellaneous Amendments) Bill 2011 which sought to, among others, allow lists of candidates of different constituencies and candidates of FC or EC subsectors with multiple seats to send their promotional letters to the same elector/voter free of postage. The new arrangements would only apply to a list of candidates in a Geographical Constituency ("GC") and a list of candidates in the DC (second) FC; candidates in the Labour FC which had three seats; and candidates standing for election in the same EC subsector, which had multiple number of seats (ranging from 16 seats to 60 seats).

31. Some members were of the view that in anticipation of the need for DC (second) FC candidates to reach out to all registered electors across the territory, they should be allowed to present their election platform through the electronic media. They pointed out that distribution of EAs via electronic media was common place in overseas countries and the current restriction on electioneering on television and radio should be relaxed. The Administration, however, maintained its view that EAs via electronic media should be prohibited in an election campaign to ensure a level-playing field for all candidates.

32. Some members considered it very inconvenient for candidates to submit to REO hard copies of EAs, authorization letters, ERs, etc. in order to comply with the current statutory declaration requirement under the respective electoral procedures regulations made by EAC. They requested the Administration to

facilitate candidates by accepting election materials transmitted electronically and develop an information technology system to cater for the electronic transmission of all types of election materials.

33. The Administration advised that the use of electronic means for the submission of election materials was being actively pursued. It was however necessary to resolve firstly the problems of printing EAs disseminated via social networking or communication websites such as Facebook, blogs, etc. for public inspection. In response to members' concerns, EAC would amend the respective regulations to allow candidates to submit electronic EAs and the required declaration electronically and to require candidates to deposit with REO a declaration and the declared electronic EAs by the end of the first working day following the day on which the advertisements were sent or displayed through social networking or communication websites on the Internet.

34. REO briefed the Panel on the key electoral arrangements proposed by EAC for the 2011 DC election to be held on 6 November 2011 and consulted members on the Proposed Guidelines on Election-related Activities in respect of the DC Election issued by EAC. Members had diverse views about whether the polling hours for the 2011 DC election should be reduced. While some members considered that the polling hours should be shortened so as to save staffing resources, some other members expressed concern that the shortening of the polling hours would reduce the voters' turnout rate as many workers had to work very long hours even on Sundays. The Administration advised that it would listen to the views of members and political parties in reviewing whether the polling hours should be slightly revised.

35. Some members expressed concern about the extension of the "equal time" principle to the broadcast of election-related programmes on the Internet. They considered that the proposed regulations would impose restrictions on discussions or broadcasting activities on the Internet. Given the extensive use of online broadcast and the popularity of uploading videos on social networking or communication websites, members in general considered that it would not be feasible to comply with the guidelines. REO assured members that EAC would listen to all the views on the proposed guidelines and would consider making amendments as appropriate.

#### Election petition mechanism

36. Following a judgment by the Court of Final Appeal ("CFA") on 13 December 2010 that the finality provision in section 67(3) of the LegCo Ordinance (Cap. 542) ("LCO") was unconstitutional and invalid as being inconsistent with BL82 which provided that the power of final adjudication of HKSAR shall be vested in CFA, the Panel discussed the Administration's

proposal for introducing a leap-frog appeal mechanism to allow an appeal against the CFI's determination on an election petition under LCO, the DC Ordinance (Cap. 547) ("DCO") and the Village Representative ("VR") Election Ordinance (Cap. 576) ("VREO") to be lodged to CFA direct, subject to leave being granted by the Appeal Committee of CFA.

37. Some members supported the Administration's proposal on the ground that there should be an efficient election petition mechanism in place to resolve election disputes expeditiously. They considered that the proposed leap-frog appeal mechanism was consistent with BL82 which provided that the power of final adjudication of HKSAR should be vested in CFA.

38. Some other members, however, expressed reservations about the proposal. They considered that there was no pressing need to amend LCO given that CFA had declared that the finality provision in section 67(3) of LCO which barred any further appeal from an election petition from CFI was unconstitutional and invalid, and the normal course of appeal would apply automatically to challenges to CFI's determination. These members queried the appropriateness of the proposed extension of the leap-frog appeal mechanism to DC and VR elections. They expressed concern that if all the appeals from the decision of CFI in election petitions could be lodged directly to CFA, the Court might need to handle a lot of cases within a short time. Some members also considered it inappropriate to propose a leap-frog appeal mechanism as it would deprive petitioners of the right to a normal appeal process. Furthermore, since legal aid did not cover election petition cases, it would be unfair to a petitioner if he or she could only appeal directly to CFA as the legal costs involved would be much higher than appeal to the Court of Appeal.

39. The Administration explained that since CFA had declared that the finality provision contained in section 67(3) of LCO was invalid as being inconsistent with BL82, it would be prudent to propose suitable amendments to section 67(3) of LCO to stipulate unequivocally the election petition mechanism. As a finality provision in identical terms was contained in DCO and VREO, and there were petition cases in progress in respect of the DC election, it would be appropriate to propose amendments to these two ordinances for the avoidance of doubt and speedy determination of appeals from such election petitions.

#### Proposed replacement mechanism for filling vacancies in LegCo

40. A LegCo Member from each of the five GCs resigned from his/her office on 29 January 2010 for the purpose of triggering a "de facto referendum" via a by-election. These five resigned Members were all re-elected in the by-election conducted on 16 May 2010 to fill the vacancies. The Panel passed a motion during the legislative session 2009-2010 expressing the view, among others, 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.

41. The Panel held a special meeting to receive a briefing from the Administration on its proposed replacement mechanism for filling a vacancy in LegCo which would be applicable to GC and the five new DC (second) FC seats. According to the proposed replacement mechanism, a vacancy arising mid-term in LegCo would be filled by the first candidate who had not yet been elected in the list with the largest number of remainder votes. According to the Administration, the proposed replacement mechanism for filling vacancies in LegCo would be consistent with the proportional representation electoral system and could reflect the overall will of the electorate expressed during the general election.

42. Some members welcomed the Administration's move to put forward the proposed replacement mechanism which, they considered, could prevent the existing replacement arrangement from being abused in the future. They expressed concern that a DC (second) FC Member who would be returned from the whole HKSAR as a single constituency could also set in motion the need to a by-election by resignation. These members were supportive of the Administration's proposal for not filling a vacant seat with a candidate from the same list of candidate as the resigned Member in order to avoid that Member handing over the seat to a successor of the same affiliation.

43. Some other members, however, expressed strong objection to the proposed replacement mechanism which, they considered, would distort the views of the electorate and deprive electors of their voting right in by-elections. They pointed out that as the list voting system was adopted for the GC general and the DC (second) FC elections, it was illogical that the vacancy was not to be filled by the first candidate who had not been elected in the same list of candidate as the resigned Member. These members also stressed that the Administration should have conducted a comprehensive public consultation on the proposal as the basic rights of the public would be affected.

44. The Panel held another special meeting to receive views from 88 deputations/individuals on the proposed replacement mechanism for filling a vacancy in LegCo. Diverse views were also expressed at the meeting.

#### The Political Appointment System and related issues

45. Arising from a report published by a non-governmental organization about the governance performance of the Government, the Panel held a discussion with the Administration on the legislative programme of the Government, the

relationship between the executive and the legislature, and the mid-term review of remuneration for Under Secretaries and Political Assistants under the political appointment system ("PAS").

46. Some members expressed concern about the decreasing number of bills submitted by the Government and passed by LegCo since the First LegCo. They were dissatisfied that the Administration tended to disregard the views of LegCo in rolling forward legislative proposals, particularly those of controversial nature.

47. The Administration explained that since the establishment of HKSAR, over 90% of the bills submitted by the Government were passed by LegCo during the respective terms (i.e. 1998-2000, 2000-2004 and 2004-2008). The legislative success rate should be calculated on the basis of the total number of bills submitted by the Government during that term. The Administration had to exercise caution in balancing the views of various sectors of the community and would continue to maintain the local economic growth, improve social policies and enhance the constitutional development of Hong Kong.

48. Noting that requests from LegCo Members to meet with Under Secretaries had sometimes been rejected, some members expressed dissatisfaction that politically appointed officials had not fulfilled effectively their duties in liaising with LegCo Members, attending meetings of LegCo and explaining government policies. The Administration assured members that all Bureaux Secretaries and Under Secretaries were keenly aware of the need to enhance communication with the legislature and the political parties.

49. Some members considered the performance of the current batch of Under Secretaries and Political Assistants a disappointment. They opined that the Administration should review the performance of politically appointed officials and the overall structure of PAS. The Administration explained that the creation of the Under Secretary and Political Assistant positions since 2007-2008 was a new initiative and it needed time to consolidate experience and identify areas for further improvement. It was envisaged that the Fourth-term CE would review the organization of policy bureaux and PAS before resuming office. Endorsement would be sought from LegCo should there be changes to the system.

50. Following the hospitalization of the former Secretary for Commerce and Economic Development, the need to formulate policy concerning sick leave of Principal Officials ("POs") and the related work arrangements was raised at the meetings of the House Committee on 1 and 8 April 2011. The Panel had requested the Administration to explain its policy on disclosure of illness of POs and the arrangements made during the temporary absence of POs. According to

the Administration, the policy was not to disclose to the public details of illness of POs on sick leave. It was for individual officials on sick leave to decide whether to disclose their illness to the public.

51. While recognizing the need to strike a balance between the public's right to know and protecting the privacy of POs, some members were of the view that as public interest was at stake, the Administration should put in place a mechanism under which a clear account would be given to the public on the health condition of a PO if that PO was unable to perform his or her duties in a certain period of time so as to dispel any speculation.

#### Declaration of interests by Executive Council Members

52. Pursuant to the media reports and public concern on the omission by an Executive Council ("ExCo") Member to register certain interests concerning land and property under the "Annual Declaration of Registrable Interests of Members of ExCo", the Panel discussed with the Administration the system of declaration of interests by ExCo Members.

53. Some members expressed dissatisfaction that the Administration had concluded the relevant case without any investigation that the ExCo Member concerned did not deliberately cover up or violate the declaration requirements. They considered it unacceptable that an ExCo Member had repeatedly omitted to declare his personal interests and contravened the requirements under the declaration system. These members considered that the existing system of declaration of interest by ExCo Members could not tackle conflict of interest issues or potential conflict of interests perceived by the public.

54. The Administration stressed that no deliberate breach of the declaration system had been found after examination of the case. Under the existing practice, all official and non-official ExCo Members were required to declare their personal interests according to the established practice and the ExCo Secretariat would check the registered interests against the discussion items of an ExCo meeting in ascertaining the possibility of a conflict of interests in respect of particular ExCo Members. If a Member was considered to have significant pecuniary interest such as directorship and partnership of companies, professional positions and other close or substantial interests, CE might request a Member not to participate in the discussion, or the Secretariat would withhold relevant ExCo papers and minutes from the Member according to the established practice.

55. Some members considered that the Administration should improve the system of declaration of interests by ExCo Members, in particular, on the registrable interest concerning land and property held through a company in order

to help ExCo Members declare their interests accurately. They took the view that the declaration requirements of ExCo Members should be more stringent than that of LegCo Members as the former had greater influence on policy formulation.

### Personal data protection

#### *Work of the Office of the Privacy Commissioner for Personal Data*

56. Following the Government's announcement of the appointment of Mr Allan CHIANG Yam-wang as the new Privacy Commissioner for Personal Data ("PCPD"), the Panel invited the new Commissioner to brief members on his vision and the work of his Office. The Panel also received two reports by the Commissioner on the strategy plan and the progress of work of his Office covering complaints handling, investigation results, review of the Personal Data (Privacy) Ordinance ("PDPO"), initiatives on protection of personal data and a series of new public education and promotion programmes.

57. Some members expressed concern that the incumbent PCPD might not possess the requisite knowledge and experience on privacy protection given that the selection board for the appointment comprised mainly members of the business sector who lacked the expertise in human rights protection and there was no monitoring mechanism over the work of PCPD. The incumbent PCPD assured members that he was confident that he possessed the requisite knowledge in legal matters and experience in public administration, the commitment as well as a clear vision about the Office of PCPD to perform competently the roles of PCPD and promote the protection of personal data privacy in the community.

58. Noting that the Administration had turned down the Office of PCPD's non-recurrent bid for permanent office accommodation, some members reiterated their concerns that the Office of PCPD was not provided with sufficient financial and manpower resources to discharge its functions effectively, and the quality of services provided by the Office of PCPD might be compromised due to increasing workload.

59. The Administration assured members that the Constitutional and Mainland Affairs Bureau ("CMAB") would strive to provide the Office of PCPD with adequate resources for the effective implementation of the Ordinance. Since the transfer of policy area of personal data protection to CMAB from mid-2007, the Bureau had increased the annual financial provision to the Office of PCPD from \$36 million in 2007-2008 to \$48 million in 2010-2011. The Administration had also allocated funding to the Office of PCPD for the creation of 13 posts during the past three years to strengthen the Office of PCPD's manpower provision.

60. PCPD assured the Panel that his Office would continue to streamline work procedure and redeploy internal manpower to cope with the increasing workload. According to PCPD, through enhanced working procedure, cases were handled within a reasonable timeline with the number of long outstanding cases reduced as a result. The staffing structure and the remuneration system would also be reviewed with a view to effecting a cultural change and building a loyal and dedicated staff force.

#### *Review of the Personal Data (Privacy) Ordinance*

61. The Government, with the support of PCPD, had conducted a review of PDPO to examine whether its existing provisions still afforded adequate protection to personal data having regard to social developments over the last decade or so. Following the issuance of the Consultation Document on PDPO in 28 August 2009, the Administration further published the Report on Public Consultation on Review of PDPO and the Report on further public discussions on Review of PDPO in October 2010 and April 2011 respectively. The Panel held a number of meetings to discuss the legislative proposals with the Administration and PCPD. The Panel also held a special meeting to receive views from the public on the proposals.

62. Some members considered that PCPD was not granted adequate power to enhance protection of personal data in the light of serious contraventions of PDPO in recent years. They expressed concern that the Administration did not propose to grant criminal investigation and prosecution power to PCPD and queried whether the Police had sufficient resources and expertise to conduct criminal investigation into cases involving contravention of PDPO referred by the Office of PCPD.

63. Some other members, however, were of the view that vesting enforcement, criminal investigation and prosecution powers in a single body was against the principle of natural justice and might lead to inadequate checks and balances. They opined that strong justifications would be required for concentrating criminal investigation and prosecution powers in a single body in specific domains.

64. It was the Administration's view that the existing arrangements, under which the power to conduct criminal investigation, prosecute and give ruling on criminal cases were separately vested with the Police, the Department of Justice and the Judiciary in order to ensure a fair trial and judicial independence, had been functioning well and should not be changed lightly. The Administration considered that PCPD should continue to exercise his investigation power available under the existing framework of PDPO and put more emphasis on its education and complaint handling work as an advocate for privacy protection.

The Administration also assured members that the Police had substantial experience in and attached great importance to handling cases of privacy contravention referred by the Office of PCPD.

65. Some members considered that any serious contravention of PDPO should be made a criminal offence subject to immediate prosecution in order to enhance deterrent effect. They were concerned that under the existing PDPO, PCPD could only serve an enforcement notice ("EN") on a data user in case of non-compliance with a Data Protection Principle and it was only upon the issuance of EN and the failure to comply with the directions in the EN that an offence would be committed.

66. The Administration explained that it proposed to introduce in PDPO additional specific requirements on data users who intended to use (including transfer) the personal data collected for direct marketing purposes. While non-compliance with any of the additional specific requirements for collection and use of personal data for direct marketing purposes would be subject to issuance of an EN, it would be a criminal offence for a data user to use personal data for direct marketing without complying with any such additional requirements or against the wish of the data subject. A similar two-step approach would also be adopted to regulate unauthorized sale of personal data by a data user. Members also noted that the Administration proposed to raise the penalty to a fine of \$500,000 and imprisonment for three years for contravention of requirements for collection and use of personal data in direct marketing; and a fine of \$1,000,000 and imprisonment for five years for contravention of requirements for sale of personal data to enhance the deterrent effect.

67. Some members expressed strong support for adopting an "opt-out" mechanism for collection and use of personal data on the grounds that it could facilitate business developments and the Administration had already proposed to introduce additional specific requirements to strengthen the regulation over the collection and use of personal data in direct marketing as well as the sale of personal data. Some other members, however, took the view that adopting an "opt-out" mechanism did not afford adequate safeguards to the personal data as explicit consent of consumers was not required.

68. The Administration advised that it intended to adopt an "opt-out" mechanism for collection and use of personal data in direct marketing and sale of personal data having regard to the experiences of overseas countries. The Administration emphasized that an "opt-out" mechanism could strike a balance between safeguarding the personal data privacy of the public and facilitating business operations.

69. Members in general expressed support for the proposal for empowering PCPD to provide legal assistance to an aggrieved data subject to institute legal proceedings to seek compensation under section 66 of PDPO to enhance the sanctioning powers of PCPD. The Administration advised that the proposal would be implemented following the existing model of the Equal Opportunities Commission to provide legal assistance to complainants.

70. Some members expressed concern about the misuse and unauthorized use of personal data on the Internet which had aroused widespread public concern. They considered that the Administration should review the definition of "personal data" in light of the development of technology having regard to the Yahoo case in which the IP address of a journalist who was an email user of "Yahoo! China" residing in the People's Republic of China was disclosed by "Yahoo! Holdings (Hong Kong) Limited" leading to his arrest and conviction of the offence of illegally providing state secrets to foreign entities. The Administration reiterated that the IP address per se should not amount to personal data within the definition of PDPO. If an IP address was used in conjunction with other identifying particulars of an individual, those data had already been afforded protection under the existing PDPO.

71. Some members considered that section 33 of PDPO, the only provision which had not commenced operation, should be brought into operation as soon as practicable to prohibit the transfer of data by data users to another territory where comparable privacy protection was lacking. Some other members, however, took the view that it would not be practical and feasible to regulate data processing outside Hong Kong having regard to the prevalence of cross-boundary data transfer activities in recent years. The Administration explained that as implementing section 33 would have significant implications on data transfer activities of various sectors of the community, the Administration needed to consult stakeholders to assess the readiness of the community for the operation of section 33.

### Third report of HKSAR under the International Covenant on Economic, Social and Cultural Rights

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72. Following the submission of the HKSAR's third report under the International Covenant on Economic, Social and Cultural Rights ("ICESCR") to the United Nations in June 2010, the Panel discussed the third report with the Administration before the relevant hearing held by the United Nations Committee on Economic, Social and Cultural Rights ("UNCESCR").

73. Some members expressed concern about the issue of poverty in Hong Kong. Noting that the Gini Coefficient for Hong Kong was 0.533 in 2006, they called on the Administration to establish a poverty line and formulate policies to

alleviate disparity between the rich and the poor, especially poverty among the elderly. They considered that many outstanding matters, including the long waiting time for the elderly to be allocated a residential care place, the low Comprehensive Social Security Assistance rates and the inadequate provision of medical services for the elderly should be dealt with. They also considered that the existing housing policies were not effective in addressing the housing needs of the street sleepers.

74. The Administration advised that the Government had facilitated transfer of social benefits to reduce income disparity through taxation and the provision of social welfare. The Administration had adopted an adjusted Gini Coefficient, taking into account the situation in Hong Kong, including the provision of a comprehensive social welfare system, medical benefits and free education, which showed that the wealth gap had not turned for the worse from 1996 to 2006. The Government's policy was to assist the elderly to age in place, and to be supported by residential homes. A range of subsidized home-based and care-based community care services were provided to elders and more than 25 000 elders had benefited from these community services.

75. Members also raised various issues of concern including the Administration's refusal to set up an independent human rights institution, to outlaw discrimination on the ground of sexual orientation, to tackle the issue of single-parent families and split families, and to allocate resources to address the problems faced by men in relation to employment, education, health and family. They also expressed concern about the lack of barrier free facilities for persons with disabilities and urged the Administration to provide support measures to meet the education needs for non-Chinese speaking students. The Administration advised that it had taken into account the comments and views received from Members and the community during the public consultation on the proposed outline of the report from January to February 2010 to reflect the views of the community.

## **Meetings**

76. From October 2010 to June 2011, the Panel held a total of 14 meetings. It has scheduled another meeting in July 2011.

### **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 for 2010-2011 session**

<b>Chairman</b>	Hon TAM Yiu-chung, GBS, JP
<b>Deputy Chairman</b>	Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
<b>Members</b>	Hon Albert HO Chun-yan Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP Dr Hon Margaret NG Hon CHEUNG Man-kwong 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-yee, GBS, JP Hon Emily LAU Wai-hing, JP Hon Timothy FOK Tsun-ting, GBS, JP Hon Abraham SHEK Lai-him, SBS, JP Hon Audrey EU Yuet-mee, SC, JP Hon WONG Kwok-hing, MH Hon LEE Wing-tat Hon Jeffrey LAM Kin-fung, GBS, 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, JP Hon WONG Kwok-kin, BBS Hon IP Kwok-him, GBS, JP Hon Mrs Regina IP LAU Suk-yee, GBS, JP Dr Hon PAN Pey-chyou (up to 18 November 2010)

Hon Paul TSE Wai-chun, JP  
Dr Hon Samson TAM Wai-ho, JP  
Hon Alan LEONG Kah-kit, SC  
Hon LEUNG Kwok-hung  
Hon Tanya CHAN  
Hon WONG Yuk-man

(Total : 36 members)

**Clerk**

Miss Flora TAI

**Legal Adviser**

Mr Arthur CHEUNG

**Date**

4 July 2011