立法會 Legislative Council

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Special House Committee meeting on 27 February 2004

Background Brief prepared by Legislative Council Secretariat

Review on constitutional development after 2007

Purpose

This paper provides information on past discussions held by Members of the Legislative Council (LegCo) on the review on constitutional development after 2007 since the establishment of the Task Force on Constitutional Development.

Basic Law provisions

- 2. Under Article 45 of the Basic Law, the Chief Executive (CE) of the Hong Kong Special Administrative Region (HKSAR) shall be selected by election or through consultations held locally and be appointed by the Central People's Government (CPG). The method for selecting CE shall be specified in the light of the actual situation in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of CE by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.
- 3. Under Article 68 of the Basic Law, LegCo shall be constituted by election. The method for forming LegCo shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all LegCo Members by universal suffrage.
- 4. The specific methods for selecting CE and forming LegCo are specified in Annex I and Annex II to the Basic Law respectively. If there is a need to amend the method for selecting CE for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all LegCo Members and the consent of CE and be reported to the Standing Committee of the National People's Congress (NPCSC) for approval. Any amendments made to the method for forming LegCo after 2007 must be made

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with the endorsement of a two-thirds majority of all LegCo Members and the consent of CE and be reported to NPCSC for the record.

Task Force on Constitutional Development

- 5. The review on the constitutional development after 2007 has been discussed by the Panel on Constitutional Affairs (CA Panel) at various meetings since the 1999-2000 session. The CA Panel has also received views from deputations on a number of occasions.
- 6. In October and November 2003, the Secretary for Constitutional Affairs (SCA) advised the CA Panel that the Government would make a decision on the timetable for public consultation and review on constitutional development before the end of 2003. However, SCA subsequently advised the CA Panel on 15 December 2003 that the Government could only come to a decision on the timetable by the end of 2003, and in order to tie in with other arrangements, it could only give Members an account in early 2004.
- 7. In his Policy Address delivered on 7 January 2004, CE announced the setting up of the Constitutional Development Task Force (Task Force), headed by the Chief Secretary for Administration (CS), with the Secretary for Justice and SCA as members.
- 8. The role of the Task Force is to help the public understand the views of the Central Authorities, reflect the views of the public to the Central Authorities, and carry out constitutional review on the basis of a common understanding between the Central Authorities and the HKSAR Government regarding the Basic Law.

Major concerns raised by Members

Consultation with Members by the Task Force

- 9. At the House Committee meeting on 9 January 2004, Members decided that the Chairman of the House Committee should request CS to provide details on the timetable for the work of the Task Force and consult Members before the visit of the Task Force to Beijing after the Chinese New Year.
- 10. CS had advised the Chairman of the House Committee that he would discuss the issues raised with the CA Panel. The Task Force briefed the CA Panel on its work at the meetings of the Panel on 15 and 28 January 2004.
- 11 The Task Force made a visit to Beijing from 8 to 10 February 2004. CS made a statement on the visit at the Council meeting on 11 February 2004. For details, Members are invited to refer to the Official Record of Proceedings of the meeting.

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12. The CA Panel discussed issues arising from the CS's statement and received a report on the progress of the Task Force in meeting with the public at the meeting of the Panel on 16 February 2004.

<u>Issues on principles and legislative process relating to constitutional development</u>

- 13. The Task Force has identified two categories of issues relating to constitutional development which require to be addressed, i.e. issues on principles and legislative process.
- 14. There are three main areas on principles -
 - (a) issues on principles relating to the relationship between the Central Authorities and the HKSAR;
 - (b) constitutional development should be in accordance with the "actual situation" and the principle of "gradual and orderly progress"; and
 - (c) the principles of "giving consideration to the interests of all sectors of the community" and "facilitating the development of capitalist economy" as mentioned by Mr JI Pengfei in 1990.
- 15. The five issues on legislative process are set out in **Appendix I**.
- 16. CS has advised Members that CPG has constitutional powers and responsibilities to oversee the constitutional development in HKSAR. The Central Authorities has agreed that the issues identified by the Task Force should be dealt with, and priority should be accorded to those issues on principles.
- 17. Some Members consider that some of the issues on principles identified by the Task Force are political issues on which views could differ. They also consider that the Central Authorities should adopt a liberal interpretation on those principles which are clearly stipulated in the Basic Law. Some Members have queried why a common understanding should be reached with the Central Authorities on the meaning of "actual situation" and "gradual and orderly progress", as well as the principles mentioned by Mr JI Pengfei. They also consider that constitutional development should be driven by the mainstream opinion in the HKSAR, in accordance with the principle of "One Country, Two Systems".
- 18. Some Members consider that some of the issues on legislative process identified by the Task Force are non-issues. For example, they consider that the amendment procedures in Annexes I and II to the Basic Law are self-sufficient, and it is unnecessary to consult the Central Authorities and the public on whether there is a need to invoke Article 159 of the Basic Law for amending the two

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annexes. Some Members also criticize that the Task Force has deliberately dwelled on these issues as a tactic to stall the review on constitutional development.

Timetable

- 19. CS has advised Members that the Task Force has no timetable at this stage. The process of discussions with the public and the Central Authorities is important in terms of laying a common foundation for the work relating to constitutional development. Efforts would be made for the whole exercise, including the necessary legislative work, to be completed before 2007.
- 20. Some Members are disappointed that the Task Force has not provided a timetable for review on constitutional development. They have expressed concern about the time required for achieving a common understanding with the Central Authorities on the relevant issues.

Consultation with the Central Authorities and within HKSAR

- 21. On future work plan, CS has advised Members that during the period from 16 January 2004 to 13 February 2004, the Task Force had met a total of 19 different groups and individuals to listen to their views on the issues on principles and legislative process. The Task Force will further meet with over 30 different groups and individuals and hopes to complete the first round of meetings in early March 2004. The Task Force will liaise with the Central Authorities, at an appropriate time, to report on the progress made and to reflect the views of the public.
- 22. To facilitate members of the public to give views on the issues on principles and legislative process, the issues have been put in the form of questions posted onto the website launched by the Task Force on 19 February 2004 (www.cabreview.gov.hk). A list of the questions posted on the website is in **Appendix II**.
- 23. The Task Force hopes that the Hong Kong community will discuss the issues on principles and legislative process rationally and thoroughly and strive for consensus. Some Members have expressed concern about the criteria and methodology adopted by the Task Force to assess whether "consensus" has been reached on the relevant issues, and have requested the Government to conduct a public opinion survey for such purpose.
- 24. Some Members have asked whether the Task Force has discussed the possibility of introducing universal suffrage for the elections of CE and LegCo in 2007 and 2008 respectively during its visit to Beijing. They have also asked whether HKSAR could discuss specific proposals on constitutional development if a common understanding has not been reached with the Central Authorities.

- 25. CS has advised that the Task Force has not discussed specific proposals on political reform with the Central Authorities during its visit to Beijing. In theory, discussions on specific proposals could start within HKSAR in the absence of a common understanding reached with the Central Authorities, but the public should be aware of the possible consequences and the process in such a scenario would be a difficult one.
- 26. Some Members have expressed concern that the recent arguments about the definition of "patriotism", as well as press reports saying that Beijing has ruled out universal suffrage in 2007 and 2008 and Beijing may set up an "alternative legislature", would not be conducive to the discussions on constitutional development. They have requested the Task Force to clarify the stance of the Central Authorities on these matters, and advise the Central Authorities that Hong Kong people merely strive for democratic development, and have no intention whatsoever of seeking independence.

LegCo questions

- 27. Members have raised the following LegCo questions which are related to constitutional development of the HKSAR after 2007 in the current session -
 - (a) Dr Hon YEUNG Sum raised an oral question on "Timetable for review on political system" at the Council meeting on 8 October 2003. A copy of the question and the Administration's reply is in **Appendix III.** For details, Members are invited to refer the Official Record of Proceedings of the meeting; and
 - (b) Hon Michael MAK Kwok-fung raised an oral question on "Constitutional development of Hong Kong" at the Council meeting on 18 February 2004. A copy of the question and the Administration's reply is in **Appendix IV**.

Relevant papers

28. A list of the relevant papers on the subject of constitutional development is in **Appendix V** for Members' reference. These papers are available on the Council's website at http://www.legco.gov.hk.

Council Business Division 2 <u>Legislative Council Secretariat</u> 24 February 2004

<u>Issues on Legislative Process and related Legal Issues</u> <u>concerning Constitutional Development in the Basic Law</u>

Issues on process can be broadly classified into two categories:

- (A) legislative process; and
- (B) related legal issues.

(A) Legislative Process

- (1) What legislative process should be used for amending the methods for selecting the Chief Executive and for forming the Legislative Council as set out in Annex I and Annex II to the Basic Law
- 2. Annex I and Annex II to the Basic Law stipulate, respectively, the procedural requirements for amending the method for selecting the Chief Executive and the method for forming the Legislative Council. However, there are no indications on what legislative process is to be used for making such amendments.
- 3. There is a view that any amendment made to the methods as prescribed in the relevant Annexes only requires making necessary amendments to the local electoral laws in Hong Kong. However, there is another view that any amendment made to the method for selecting the Chief Executive and the method for forming the Legislative Council as prescribed in Annex I or Annex II to the Basic Law should, according to the Basic Law, carry constitutional status. As with the present arrangements laid down in Annex I and Annex II, the principled provisions should first be provided for in Annex I and Annex II to the Basic Law, followed by the enactment of local legislation to complement these new provisions.
- 4. Moreover, the legislative process giving effect to the amendments to the methods referred to above cannot be completed solely within the HKSAR. According to the Basic Law, if there is a need to amend the method for selecting the Chief Executive, such amendments shall be

reported to the Standing Committee of the National People's Congress for approval; if there is a need to amend the method for forming the Legislative Council, such amendments shall be reported to the Standing Committee of the National People's Congress for the record.

- 5. We need to further discuss and confirm, in connection with any amendment made to the method for selecting the Chief Executive and the method for forming the Legislative Council in accordance with Annex I and Annex II respectively:
 - (i) the appropriate legislative process to be adopted, especially as this involves the legal system and procedures of the Mainland; and
 - (ii) whether such amendments are to be based on legislation enacted at the constitutional level, to be complemented by local legislation.
- (2) Whether there is no need to invoke Article 159 of the Basic Law if the amendment procedures as prescribed in Annex I and Annex II are used
- 6. In view of the statement made by Mr Ji Pengfei at the Third Session of the Seventh National People's Congress on 28 March 1990, it is clear that the purpose of enacting Annex I and Annex II is to make it more amenable to amendment when necessary. Therefore, the understanding has always been that the amendment procedures in Annexes I and II are self-sufficient, and that the amendment procedures in Article 159 of the Basic Law would not apply. However, as Annex I and Annex II are an integral part of the Basic Law, there is another view that any amendment to the methods as prescribed in the Annexes is tantamount to amending the Basic Law itself, and therefore the amendment procedures in Article 159 of the Basic Law should apply.

(3) Initiation of amendments relating to the methods for selecting the Chief Executive and for forming the Legislative Council

7. Amendments to the methods for selecting the Chief Executive and for forming the Legislative Council involve constitutional provisions and are related to the composition of the political structure. Any initiation of the relevant amendments must be dealt with

according to the Basic Law. We would be pleased to listen to views on the issue of initiation of amendments.

(B) Related Legal Issues

- (4) Whether the method for forming the third term Legislative Council as prescribed in Annex II may apply to the fourth term and subsequent terms of the Legislative Council
- 8. Annex II to the Basic Law clearly prescribes the method for forming the first, second and third terms of the Legislative Council. However, Annex II does not prescribe explicitly the method for forming the Legislative Council for the fourth and subsequent terms.
- 9. If a consensus on whether to amend the method for the formation of the Legislative Council after 2007 cannot be reached, and therefore the amendment procedure as prescribed in Section III of Annex II could not be triggered or completed, the question may arise as to whether this would give rise to any legal vacuum and thus the fourth term of the Legislative Council could not be formed, or whether the view could be taken that the fourth term Legislative Council could be formed using the same composition of the third term. We need to further discuss this issue.

(5) How the phrase "subsequent to the year 2007" should be understood

10. We have carried out internal study on how the phrase "subsequent to the year 2007" as contained in paragraph 7 of Annex I to the Basic Law should be understood. In the course of our study, we have made reference to a range of materials, including the statement made by Mr JI Pengfei at the Third Session of the Seventh National People's Congress on 28 March 1990 when submitting the Basic Law (Draft) and its relevant documents. Our conclusion is that if there is a need, amendments to the method for selecting the third term Chief Executive in 2007 may be considered. If there are other views in the community about this subject, we will be pleased to listen to them.

Appendix II

A list of questions posted on the website

A. Principles

A1. The Hong Kong **Special** Region (HKSAR) Administrative comes directly under the Central People's Government (CPG), CPG has constitutional powers and responsibilities to oversee the constitutional development in the HKSAR, and has a responsibility to ensure that the development within Hong Kong's political structure is in accordance with "One Country, Two Systems" and the Basic Law, and the provisions relating to the relationship between the Central Authorities and the HKSAR.

Your Views

- A1. How could Hong Kong's political structure develop in accordance with the following principles in the relevant Basic Law provisions which relate to the relationship between the Central Authorities and the HKSAR:
 - (1) Hong Kong is an inalienable part of China (Article 1 of the Basic Law)?
 - (2) HKSAR comes directly under the CPG (Article 12 of the Basic Law)?
 - (3) The Chief Executive (CE) is appointed by the CPG. He is accountable to both the CPG and the HKSAR (Articles 43 and 45 of the Basic Law)?

A. Principles

A2. Articles 45 and 68 of the Basic Law stipulate that the methods for selecting the CE and for forming the Legislative Council (LegCo) must be specified in the light of the "actual situation" in the HKSAR and in accordance with the "principle of gradual and orderly progress". The ultimate aim is the selection of the CE by universal suffrage upon broadly nomination by a representative nominating committee accordance with democratic procedures, and the election of all the members of the LegCo by universal suffrage.

Your Views

- A2. On the principles of "actual situation" and "gradual and orderly progress":
 - (1) what should "actual situation" constitute?
 - (2) how "gradual and orderly progress" should be understood?

A. Principles

A3. When submitting the Basic Law (Draft) and its relevant documents to the Seventh National People's Congress on 28 March 1990, Mr JI Pengfei, Chairman of the Drafting Committee for the Basic Law of the HKSAR, explained that:

"The political structure of the Kong Special Hong Administrative Region should accord with the principle of 'One Country, Two Systems' and aim maintain stability and to prosperity in Hong Kong in line with its legal status and actual situation. To this end. consideration must be given to the interests of the different sectors of society and the structure must facilitate the development of the capitalist economy in the Region. While the part of the existing political structure proven to be effective will be maintained, a democratic system that suits Hong Kong's reality should gradually be introduced....."

Your views

- A3. Basing on Mr Ji's explanation in 1990, how could the development of Hong Kong's political structure:
 - (1) meet "the interests of the different sectors of society"?
 - (2) "facilitate the development of the capitalist economy"?

B. Issues on Legislative Process

Your Views

Annex I to the Basic Law B1. stipulates that "If there is a need to amend the method for selecting the Chief Executive for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the People's **National** Congress for approval."

Annex II stipulates that "With regard to the method for forming the Legislative Council of the Hong Kong Special Administration Region and its procedures for voting on bills and motions after 2007, if there is a need to amend the provisions of this Annex, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Council and the consent of the CE, and they shall be reported to the Standing Committee of the National People's Congress for the record."

- B1. What is the most appropriate legislative procedure for amending the methods for selecting the CE and forming the LegCo set out in Annexes I and II:
 - (a) amendments to Annexes I and II and local legislation; or
 - (b) local legislation only?

B. Issues on Legislative Process

Your Views

B2. Article 159 of the Basic Law provides that:

"The power of amendment of this Law shall be vested in the National People's Congress.

The power to propose bills for amendments to this Law shall be vested in the Standing Committee of the National People's Congress, the State Council and the Hong Kong Special Administrative Region. Amendment bills from the Hong Kong Special Administrative Region shall be submitted to the National People's Congress by the delegation of the Region to the National People's Congress after obtaining the consent of two-thirds of the deputies of the Region to the National People's Congress, two-thirds of all the members of the Legislative Council of the Region, and the Chief Executive of the Region.

Before a bill for amendment to this Law is put on the agenda of the National People's Congress, the Committee for the Basic Law of the Hong Kong Special Administrative Region shall study it and submit its views.

No amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong."

B2. Do we need to follow the procedures set out in Article 159 of the Basic Law, if we amend the methods for selecting the CE or forming the LegCo as specified in Annexes I and II of the Basic Law?

B. Issues on Legislative Process	Your Views
B3. Initiation of amendments relating to the methods for selecting the CE and for forming the LegCo	B3. How should any amendment relating to the methods for selecting the CE and for forming the LegCo be initiated?
clearly prescribes the method for forming the first, second and third terms of the LegCo. However, Annex	B4. Whether the method for formation of the third term LegCo could be used for the fourth term LegCo, if no consensus were reached on whether to amend the method for forming the LegCo after 2007?
	B5. Whether the phrase "subsequent to the year 2007" should be understood to include 2007?

Timetable for Review on Political System

2. **DR YEUNG SUM** (in Cantonese): Madam President, will the Government inform this Council whether it will conduct public consultation on the review of the political system by the end of this year; if not, when it will commence the consultation exercise and when it plans to announce the outcome of the exercise?

SECRETARY FOR CONSTITUTIONAL AFFAIRS (in Cantonese): Madam President, during the National Day celebration, the Chief Executive has pointed out that the people of Hong Kong expect the Government of the Hong Kong Special Administrative Region (SAR) to promote democratic advancement according to the Basic Law, and that it is the clear duty of the current Administration to pursue this.

During 2003, the Constitutional Affairs Bureau has been conducting internal research on issues relating to constitutional development after 2007. There has been continued progress in this area of work.

The Chief Executive has also indicated that public consultation on the issue of political development after 2007 will commence in 2004.

We expect that relevant local legislation on political development will be dealt with in 2006.

There are more than three years between now and 2006 to 2007. We will ensure that there is sufficient time for the public to express their views and for the legislative work to be dealt with.

Constitutional development is important to the future of Hong Kong, and naturally we are all concerned about the timing for commencement of public consultation.

I expect that the Government will make a decision before the end of 2003 on the timetable for the review on constitutional development and public consultation, and that we will report to the Legislative Council after that decision is taken.

Madam President, I would also like to take this opportunity to refer to a few major points:

- Constitutional development is a matter of concern to the whole community. It will affect the long-term development of Hong Kong. Thus, we will consult widely during the public consultation process before putting forward final proposals for the Legislative Council's consideration.
- As stipulated in the Basic Law, if there is a need to amend our electoral system of the SAR after 2007, such amendments must be made with the endorsement of a two-thirds majority of all Members of the Legislative Council. Therefore, in handling the issue of constitutional development, the Government will endeavour to widen the common ground and narrow the differences in the community with a view to enabling different political parties and Members of Legislative Council to participate actively in the process and to express their views towards building a consensus within our community.
- In dealing with this subject of constitutional development, the SAR Government will act according to the overall interest of the community and the future of Hong Kong. During the consultation and review process, we will adopt an open and receptive attitude, in order to maximize the chances of obtaining the support of and securing consensus among two thirds of Legislative Council Members.

Madam President, although I am not able to elaborate further today on the timetable and procedures with respect to public consultation, I hope that the points I have referred to will allow us to have a better understanding of the Government's basic attitude, and will thus facilitate future co-operation between the Government and the Legislative Council in handling the issue of constitutional development.

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Appendix IV

LEGCO QUESTION NO. 4 (Oral Reply)

Asked by Hon_	Michael MAK	Date of meeting: 18 February 2004		
			Secretary for	
		Replied by:	Constitutional Affairs	

Ouestion

On 3 December last year, the State President told the Chief Executive ("CE") during the latter's duty visit in Beijing that he believed that the Hong Kong community could reach a broad consensus on constitutional development. During his visit to Hong Kong in the middle of last month, one Mainland legal scholar remarked that the Central Authorities would definitely exercise to the end their authority on Hong Kong's constitutional development. In this connection, will the Government inform this Council:

- (a) whether it has assessed if the President's comments that he believed the Hong Kong community could reach a broad consensus on constitutional development would contradict the scholar's comments that the Central Authorities would exercise their authority to the end on Hong Kong's constitutional development; if it has, of the assessment results; and
- (b) of its efforts to facilitate the Hong Kong community to reach a broad consensus on constitutional development, for instance, whether it will invite officials of the Central Government to visit Hong Kong to exchange views with various sectors directly?

Reply

Madam President,

Regarding the first part of the question, in accordance with the Constitution and the Basic Law of the Hong Kong Special Administrative Region (HKSAR), the Central Authorities have powers and responsibilities to oversee the important issue of constitutional development. The Central Authorities and the SAR Government will address the issue of constitutional development in accordance with the Basic Law. To us, the opinions expressed by the Mainland legal experts have reference value. The question of whether there is any contradiction does not arise.

Regarding the second part of the question, the Constitutional Development Task Force, led by the Chief Secretary for Administration with the Secretary for Justice and myself as members, issued a paper to the Legislative Council (LegCo) Panel on Constitutional Affairs on January 14 this year, and outlined therein three main areas of issues of principles in the Basic Law, which are:

First, issues on principles relating to the relationship between the Central Authorities and the SAR;

Second, constitutional development shall be specified in the light of the "actual situation" of the HKSAR and in accordance with the principle of "gradual and orderly progress"; and

Third, the principles of "giving consideration to the interests of all sectors of society" and "facilitating the development of the capitalist economy" as mentioned by Mr Ji Pengfei in 1990.

Our paper also set out five questions on legislative process.

Up to now, the Task Force has conducted 21 sessions to meet with various organisations and individuals from different sectors of the community, including six political parties and political groups, five politically non-affiliated LegCo Members, three chambers of commerce, eight advocacy groups, Chairmen and Vice-Chairmen of District Councils, and 19 academics, commentators and individuals. We are arranging to meet more than 30 organisations and individuals between now and early March.

In order to facilitate wider discussion of the issues on principles and legislative process in the Basic Law by the Hong Kong community, the Task Force will post the issues, in the form of questions, onto the website set up by the Task Force, so that the public and different organisations can express their views through this channel.

Furthermore, we will continue to put reports to the LegCo Panel on Constitutional Affairs on the progress of work of the Task Force and listen to Members' views.

We hope that the Hong Kong community will discuss these issues on principles and legislative process rationally, consider the matter thoroughly and strive for consensus, as further work on constitutional development will need to build upon these issues on principles and legislative process.

Appendix V

Relevant Papers

LC Paper No.		<u>Papers</u>
CB(2)1003/03-04(01) (issued on 14 January 2004)		Paper on "Task Force on Constitutional Development"
CB(2)1093/03-04(01) (issued on 27 January 2004)		Administration's response to Hon Emily LAU's request for clarification of the origin of the viewpoint that Article 159 of the Basic Law should apply to any amendments to the methods prescribed in Annexes I and II of the Basic Law
CB(2)1107/03-04(01) (issued on 27 January 2004)	-	Information Note on "Progress made in meeting the public by the Constitutional Development Task Force"
CB(2)1347/03-04(01) (issued on 13 February 2004)		Paper on "Progress of work of the Constitutional Development Task Force"
Annex A to CB(2)1347/03-04(01) (issued on 13 February 2004)	-	Statement of the Chief Secretary for Administration on the visit to Beijing at the Council meeting on 11 February 2004
Annex A to CB(2)1107/03-04(01) and Annex C to CB(2)1347/03-04(01) (CB(2)1107/03-04 issued on 27 January 2004 and CB(2)1347/03-04 issued on 16 February 2004)		Submissions received by the Constitutional Development Task Force

LegCo Questions

Legislative 8 October 200	meeting	on	on "Timetable for review on political system"
Legislative 18 February 2	meeting	on	LegCo question raised by Hon Michael MAK Kwok-fung on "Constitutional development of Hong Kong"