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Legislative Council

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LC Paper No. CB(2)1806/08-09
(These minutes have been seen by the Administration)

Panel on Constitutional Affairs

Minutes of meeting
held on Monday, 16 February 2009, at 2:30 pm
in the Chamber of the Legislative Council Building

Members present	:	Hon TAM Yiu-chung, GBS, JP (Chairman) Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP (Deputy Chairman) Hon Albert HO Chun-yan Dr Hon Margaret NG Hon CHEUNG Man-kwong Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP Dr Hon Philip WONG Yu-hong, GBS Hon WONG Yung-kan, SBS, JP Hon LAU Kong-wah, JP Hon Miriam LAU Kin-yee, GBS, JP Hon Emily LAU Wai-hing, 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 LEUNG Kwok-hung Hon CHEUNG Hok-ming, SBS, JP Hon WONG Ting-kwong, BBS 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 Sing-chi Hon WONG Kwok-kin, BBS Hon WONG Yuk-man Hon IP Wai-ming, MH Hon IP Kwok-him, GBS, JP Hon Mrs Regina IP LAU Suk-yee, GBS, JP Dr Hon PAN Pey-chyou

Member attending	:	Hon Paul TSE Wai-chun
Members absent	:	Hon LAU Wong-fat, GBM, GBS, JP Hon Timothy FOK Tsun-ting, GBS, JP Hon Abraham SHEK Lai-him, SBS, JP Hon LI Fung-ying, BBS, JP Dr Hon Samson TAM Wai-ho, JP
Public Officers attending	:	Item IV The Administration Mr Stephen LAM Sui-lung Secretary for Constitutional and Mainland Affairs Mr Joshua LAW Chi-kong Permanent Secretary for Constitutional and Mainland Affairs Mr Arthur HO Kin-wah Deputy Secretary for Constitutional and Mainland Affairs Ms Joyce HO Kwok-shan Principal Assistant Secretary for Constitutional and Mainland Affairs Item V The Administration Mr Stephen LAM Sui-lung Secretary for Constitutional and Mainland Affairs Mr Raymond TAM Chi-yuen Under Secretary for Constitutional and Mainland Affairs Mr Arthur HO Kin-wah Deputy Secretary for Constitutional and Mainland Affairs Mr Ivanhoe CHANG Chi-ho Principal Assistant Secretary for Constitutional and Mainland Affairs Mrs Vivian TING TSUI Wai-ming Chief Electoral Officer Registration and Electoral Office

Mr James O'NEIL
Deputy Solicitor General (Constitutional)
Department of Justice

Item VI

The Administration

Mr Raymond TAM Chi-yuen
Under Secretary for Constitutional and Mainland Affairs

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

Mr Hubert LAW Hin-cheung
Principal Assistant Secretary for Constitutional and Mainland Affairs

Equal Opportunities Commission

Mr Herman POON Lik-hang
Chief Legal Counsel
Equal Opportunities Commission

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

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

Ms Clara TAM
Assistant Legal Adviser 9

Mrs Eleanor CHOW
Senior Council Secretary (2)4

Mrs Fonny TSANG
Legislative Assistant (2)3

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I. Confirmation of minutes of meeting
[LC Paper No. CB(2)827/08-09]

The minutes of the meeting held on 17 November 2008 were confirmed.

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II. Information papers issued since the last meeting

2. Members noted that no information paper had been issued since the last meeting.

III. Items for discussion at the next meeting

[LC Paper Nos. CB(2)829/08-09(01) and (02)]

3. Secretary for Constitutional and Mainland Affairs (SCMA) proposed to discuss the revised Draft Code of Practice on Employment under the Race Discrimination Ordinance at the next meeting on 16 March 2009. Members agreed.

4. Ms Emily LAU proposed to discuss exit poll and invite pollsters, academia and political parties to give views at the next meeting. Members agreed.

5. Mr LAU Kong-wah suggested that the Administration should report work progress of the Mainland Affairs Liaison Office (MALO), which was responsible for co-ordinating Hong Kong's regional co-operation initiatives with relevant Mainland authorities and oversee the Hong Kong Economic and Trade Offices (HKETOs) in Guangdong, Shanghai and Chengdu, as well as the Office of the Government of the Hong Kong Special Administrative Region (HKSAR) in Beijing. SCMA responded that the Panel on Commerce and Industry was the more appropriate forum to deal with the issue. He explained that although MALO was under the purview of the Constitutional and Mainland Affairs Bureau, the work of the Office of the HKSAR Government in Beijing and HKETOs on the Mainland, which were mostly of commercial nature, were reported to the Panel on Commerce and Industry from time to time. Members agreed that the relevant issue should be taken up by the Panel on Commerce and Industry.

IV. Public consultation and legislative timetable for the two electoral methods for 2012

[LC Paper Nos. CB(2)829/08-09(03) and (04)]

6. SCMA introduced the paper which set out the timetable for public consultation and legislative process for the electoral methods for electing the Chief Executive (CE) and forming the Legislative Council (LegCo) (the two electoral methods) for 2012 [LC Paper No. CB(2)829/08-09(03)]. Members noted that the LegCo Secretariat also provided a background brief on constitutional development [LC Paper No. CB(2)829/08-09(04)].

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7. Mr LEE Wing-tat did not agree that about one year's time would be sufficient for dealing with public consultation and legislative process for the amendments to Annexes I and II to the Basic Law. He pointed out that the Commission on Strategic Development had once expressed the view that given the controversial nature of the subject of the two electoral methods for 2012 and 2017, at least two rounds of consultation would be needed to narrow differences in opinion. Mr LEE expressed concern that following CE's announcement on 15 January 2009 to postpone the public consultation on the two electoral methods for 2012 from the first half of 2009 to the fourth quarter, the consultation period would be shortened. As a result, the time allowed for scrutinising the legislative proposals for the two electoral methods would be compressed. He asked whether the Administration would rescind its decision.

8. SCMA responded that the announcement made by CE was a considered decision. The Administration recognised that the two electoral methods for 2012 and the models for universal suffrage for CE in 2017 and for LegCo in 2020 were controversial. A public consultation exercise which lasted for a few months focusing on the two electoral methods for 2012 should be adequate. While it was the current plan that the public consultation exercise would last about three months, the Administration would decide on its duration before the exercise was launched. In addition, Members and the public would have the opportunities to give further views when legislative proposals were introduced into LegCo for amending Annexes I and II to the Basic Law and the relevant local legislation.

9. Mr LEE Wing-tat expressed concern that by focusing the discussion on the two electoral methods for 2012, the Administration was precluding the discussion on the electoral methods for implementing universal suffrage for CE in 2017 and for LegCo in 2020 from the public consultation.

10. Mr CHEUNG Man-kwong said that CE had failed to honour his electoral pledge in March 2007 that he would make the best endeavour to pursue universal suffrage during his tenure of office. It appeared that CE had changed his position as the current term Government now only aimed to roll forward the electoral methods for 2012 to a mid-way point. He pointed out that when one could not tell whether the mid-way point would lead to the ultimate aim of universal suffrage, one could not tell with certainty that universal suffrage would ultimately be implemented in Hong Kong. He cited the example that the issues of nomination threshold for electing CE and the future of functional constituency (FC) were controversial issues which the public wished to address and resolve during the discussion on the electoral methods for 2012. The public would also like to know whether the amendments to Annexes I and II to the Basic Law to effect changes to the two electoral methods for 2012 would shed light on the nomination procedure for CE and the future of FC when universal suffrage was attained.

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11. SCMA said that the concept of mid-way point was not new. When the Government introduced in 2005 the package of proposals for the electoral methods for selecting CE in 2007 and forming LegCo in 2008 (the 2005 proposed package), the Administration had indicated that its passage by LegCo would bring Hong Kong closer to achieving the ultimate aim of universal suffrage. The third term Government had the constitutional duty, in accordance with the framework laid down in the Decision of the Standing Committee of the National People's Congress (NPCSC) made on 29 December 2007 (the 2007 NPCSC Decision), to take forward constitutional development in 2012. The 2007 NPCSC Decision had made clear that the election of CE in 2017 would be implemented by universal suffrage under the one-person-one-vote system. Members were therefore at liberty to discuss how the nominating committee should be formed, and how it should be transformed from the existing Election Committee. If a consensus could be reached on these issues, the outstanding issue which remained for the electoral method for CE in 2017 would be the nomination procedure. In his view, the timetable for universal suffrage laid down in the 2007 NPCSC Decision was crystal clear.

12. Ms Emily LAU said that she did not believe that the universal suffrage to be implemented for the CE election in 2017 and for the LegCo election in 2020 would comply with the international standards of "universal" and "equal" suffrage. She believed that the public also shared the same view. Ms LAU further expressed concern about the tight timetable of consultation and effecting legislating amendments to the Basic Law and local legislation. She suggested that the Administration should encourage LegCo Members to discuss among themselves with a view to reaching consensus on the models for universal suffrage.

13. SCMA responded that in accordance with the Interpretation of NPCSC made in April 2004, the constitutional duty to put forth proposals for the two electoral methods rested with the HKSAR Government. The Administration would continue to listen to members' views on the two electoral methods for 2012 at Panel meetings. In line with the previous practice, the Administration would consult the public with a view to narrowing differences before presenting to LegCo the proposed legislative amendments to the two electoral methods. He added that according to the opinion survey conducted by a tertiary institution, the timetable for universal suffrage promulgated in the 2007 NPCSC Decision was supported by over 70% of the general public.

14. Mr Ronny TONG said that according to press reports, SCMA had remarked that even though the two electoral methods for 2012 remained unchanged, it would not impact on the timetable for implementing universal suffrage. He enquired why SCMA was pessimistic about the development in 2012. Mr TONG considered that no matter how wide the gap was between the Legislature and the Executive, the Administration should strive to take forward the constitutional development of Hong Kong. He also asked about the action taken by the

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Administration to narrow differences between political parties and the Administration.

15. SCMA responded that the Administration was keen to solicit support inside and outside LegCo so that the two electoral methods for 2012 would be further democratised. When asked by the media whether the timetable for implementing universal suffrage would be affected if progress could not be made to the two electoral methods for 2012, he had responded that while democratisation of the two electoral methods for 2012 was not a prerequisite for implementing universal suffrage for CE in 2017, the Administration would make the best endeavour to obtain further democracy for the two electoral methods for 2012. In the course of consultation, he would welcome political parties to give views and submit proposals either individually or on a co-ordinated basis. As regard views received on models for implementing universal suffrage, the Administration would record and summarise them for reference for the fourth term Government.

16. Mr WONG Yuk-man said that he was not interested in the discussion on the working timetable for public consultation and legislative process for the two electoral methods for 2012. He criticised that CE and his Government were always changing their stance. CE had stated in his Policy Address for 2008-2009 that public consultation on the two electoral methods would be conducted in early 2009 and now he had decided to postpone it to the fourth quarter. SCMA had said in early 2008 that if the two electoral methods for 2012 remained unchanged, universal suffrage for CE might not be implemented in 2017. As that was contrary to what SCMA had just said, he requested clarification from SCMA. Mr WONG further said that the League of Social Democrats (LSD) would not support a proposal other than the one to implement dual universal suffrage in 2012. He expressed dissatisfaction that the Administration had imposed more hurdles on the process for amending the two electoral methods. Apart from the requirements stipulated in the Basic Law that any changes to the electoral methods should receive support from a two-thirds majority of LegCo Members, consent from CE and report to NPCSC for approval or record, the Administration had added prior to the process the requirement for CE to make a report to NPCSC and NPCSC to revert with a decision on the electoral methods. Mr WONG considered that the Administration was acting on the instruction of the Central People's Governemnt (CPG) to introduce additional hurdles for the purpose of stalling democratic development.

17. SCMA clarified that he sought to convey the message that although the progress on the two electoral methods for 2012 was not a prerequisite for implementing universal suffrage for CE in 2017, failure to achieve this would made the attainment of universal suffrage for CE in 2017 more difficult.

18. Ms Cyd HO also criticised CPG for stalling democratic development. She said that the Basic Law Drafting Committee had then intended that universal suffrage should be implemented in 2007 and 2008 but that had never been pursued.

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The statement made by Mr QIAO Xiaoyang, Deputy Secretary General of NPCSC, on 26 December 2007 that universal suffrage would be implemented for CE in 2017 and for LegCo in 2020 was in violation of the principle of gradual and orderly progress stipulated in the Basic Law. She held the view that the working timetable for public consultation and legislative process provided in the Annex to the Administration's paper was too tight and unrealistic. For instances, insufficient time had been provided for reviewing legislation for implementing the District Council (DC) elections in 2011, and for the Electoral Affairs Commission (EAC) to update the relevant electoral register and revise guidelines for subsector elections of the Election Committee in 2011. Referring to SCMA's remarks that progress on the two electoral methods for 2012 was not a prerequisite for implementing universal suffrage for CE in 2017, Ms HO pointed out that if universal suffrage could be achieved in one go in 2017, dual universal suffrage could likewise be implemented in 2012.

19. SCMA responded that for the DC elections to be held in November 2011, the Administration would introduce necessary legislative amendments into LegCo in due course. The DC elections and the related laws were not in any way affected by the amendments to be proposed to Annexes I and II of the Basic Law. SCMA considered the working timetable for public consultation and legislative process realistic, judging from the experience in handling the 2005 proposed package. Although no progress had been made at that time on the two electoral methods for CE in 2007 and for LegCo in 2008, there was sufficient time to make necessary amendments to the Chief Executive Election Ordinance (Cap. 569) and related regulations, and for EAC to update the relevant guidelines. SCMA added that the 2007 NPCSC Decision stipulated that the election of the fourth term CE and the Fifth LegCo in 2012 should not be by means of universal suffrage. Implementing dual universal suffrage in 2012 would not comply with the constitutional framework laid down therein.

20. Mr IP Kwok-him considered the timetable for public consultation and legislative process workable, provided that the Administration could put forward a package of proposals for the two electoral methods for 2012 in the fourth quarter of 2009. He urged the Administration to listen to the views received seriously and strive to forge consensus as far as possible. Mr IP, however, expressed concern that in view of the divergent views expressed by members, it would be extremely difficult to reach consensus on the two electoral methods and to make progress on constitutional development in 2012. He further said that the stance of the Democratic Alliance for the Betterment and Progress of Hong Kong (DAB) on the future of FC seats had recently been misquoted several times. He therefore clarified that DAB had never indicated support for the abolition of FCs. DAB, however, considered that the existing FC system to return Members did not comply with the principles of "universal" and "equal" suffrage and hence should not be adopted for implementation in 2020. DAB adopted an open attitude towards a FC system if it contained democratic elements and complied with the principles of "universal" and "equal" suffrage.

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21. SCMA responded that the Administration would not underestimate the challenge ahead to forge consensus on the two electoral methods for 2012. It would make the best endeavour to narrow differences in opinion. He recalled that when the discussion on the two electoral methods for 2012 began in 2007, nobody had envisaged that a timetable for implementing universal suffrage would be provided by NPCSC. The Administration would continue to work hard in taking forward constitutional development for Hong Kong. He further said that after one year's discussion, the most difficult question facing the LegCo election for 2012 was whether the size of LegCo should be expanded and if so, how the electoral method could be further democratised within the framework laid down by the Basic Law and the 2007 NPCSC Decision.

22. Mr LEUNG Kwok-hung considered that while the Administration had changed its stance frequently on constitutional development, its ultimate objective was to follow CPG's direction by delaying the implementation of universal suffrage as far as possible and faking it as much as possible. He maintained his view that the best way to gauge public acceptance of the two electoral methods was by way of holding a referendum. He added that universal suffrage was a basic human right which he would not give up lightly.

23. SCMA responded that the Basic Law did not provide a mechanism for holding referendum, and it was the Basic Law which provided that Hong Kong should attain universal suffrage in its constitutional development. The provision of a timetable for implementing universal suffrage in the 2007 NPCSC Decision indicated that CPG was committed and attached importance to providing the people of Hong Kong with further democracy.

24. Mrs Regina IP echoed the concern expressed by members about the tight timetable for public consultation and legislative process. She enquired about the possibility of advancing the public consultation before the fourth quarter of 2009 and whether the Administration would undertake not to delay the timetable further if the economic situation worsened.

25. SCMA said that the Annex to the Administration's paper sought to give members an overview of the procedural steps involved in implementing any changes to the two electoral methods. By no later than the fourth quarter of 2010, the Administration had to present to LegCo the motions on the two electoral methods for voting. The Administration would advance that work if public consultation went on smoothly and the time required to narrow differences in opinion could be reduced. He assured members that the Administration would stick to the timetable to consult the public on the two electoral methods for 2012 in the fourth quarter of 2009 irrespective of the economic situation at that time.

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26. Dr Margaret NG said that she had dealt with the Administration on the issue of constitutional development many times in the past years and was familiar with the tactic it adopted. The effort made by Members was often futile because the behaviour of government officials were influenced by factors other than taking forward the constitutional development in Hong Kong. She, however, had continued to speak out because she was answerable to the public. Dr NG stressed that pan-democratic Members would continue their plight for universal suffrage in accordance with their conscience. They had voted down the 2005 proposed package because it was not heading towards achieving democracy. Since then, SCMA had made scathing attacks on pan-democratic Members on numerous occasions. She would like to make clear that she would vote down any models for implementing universal suffrage for CE and for LegCo if FC seats were to be retained in any form. Dr NG said that the Administration had been requested to provide proposals for achieving the ultimate aim of universal suffrage and to give a definition of universal suffrage, but the Administration had declined to do so. Since CPG and the HKSAR Governemnt had refused to heed public aspiration, the community would take the matter in their own hands.

27. SCMA said that while different political parties had their own views on universal suffrage, he was concerned about the attitude of some pan-democratic Members who seemed to be pre-determined to vote down a proposal before it was introduced. He noted that Members were concerned about democratic development, but so was the Administration. The timetable for implementing universal suffrage had already set the direction for Hong Kong's future constitutional development. While there were views that FCs should be abolished, there were also views that FCs should be retained by a "one-person-two-votes" system under which each registered elector was entitled to two votes to return one Member each from a geographical constituency and a FC. The Administration noted these views and would explore these proposals.

28. Mr Albert HO said that pan-democratic Members had voted down the 2005 proposed package because the Administration had failed to provide the timetable and ultimate model for implementing universal suffrage. He explained that although the 2007 NPCSC Decision had provided a timetable, it was more like a view rather than a decision because it stated that universal suffrage for selecting CE "may" take place in 2017. It was the Administration who deduced that universal suffrage for forming LegCo could be implemented in 2020 simply because the NPCSC Decision stipulated that it could take place after the universal suffrage was implemented for the selection of CE. He was worried that if the resolution to be moved on the electoral method for CE in 2017 was voted down, the timetable for implementing universal suffrage for CE and LegCo would no longer stood and such veto could come from LegCo. Pan-democratic Members had therefore all along stressed that the models for implementing universal suffrage should be discussed first and after there was a consensus on the direction, discussions could then be held on the two electoral methods for 2012. If the nomination procedure for CE election was not open and fair or some form of the

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FC system was to be retained in the LegCo election, the universal suffrage so implemented would be inconsistent with international standards. The two electoral methods for 2012 also could not be regarded as a midway station en route to universal suffrage for CE in 2017 and for LegCo in 2020. Mr HO considered that if that was the case, the timetable for implementing universal suffrage for CE and LegCo so provided would merely seek to pacify the aspiration of Members and the community for democracy and could only be regarded as a sham. Mr HO further said that the community had cast doubt on whether CPG and the HKSAR Government were sincere about taking forward constitutional development. The timetable for public consultation and legislative process for the two electoral methods for 2012 was unrealistic if a major change was to be implemented. It could reflect that CPG and the HKSAR Government had already pre-determined the options. He cautioned the Administration not to underestimate the determination of pan-democratic Members to vote against electoral methods if they would stall any democratic development. In the event that the electoral proposals for 2012 were voted down by LegCo, he asked whether CE would step down from office.

29. SCMA responded that the 2007 NPCSC Decision stipulated clearly that universal suffrage for electing CE and for election of all the Members of LegCo by universal suffrage might respectively take place in 2017 and 2020, and it was a constitutional decision. The public expected that Members and the Government would work together to attain the ultimate aim of universal suffrage. To this end, the concerted effort of the Administration and Members were required to engender consensus to enable Hong Kong to move forward in constitutional development.

30. Dr Priscilla LEUNG held the view that unless there was a breakthrough to take forward the constitutional development in 2012, it would be difficult to attain universal suffrage for CE in 2017 and for LegCo in 2020. She expressed concern that the duration of the public consultation exercise would be too short and doubted whether consensus could be reached within three months if Members held divergent views on the two electoral methods. She suggested that the Administration should consider putting forth a proposal for the two electoral methods and starting its lobbying work as soon as possible.

31. SCMA said that the Administration was fully aware of the difficulties in reaching consensus on the two electoral methods for 2012. The Administration had been collating and summarising views received from political parties and Members, and identifying common grounds with a view to forging consensus. The Administration hoped that it could eventually find out a way to make progress on the two electoral methods for 2012, which would have positive impact on the implementation of universal suffrage for CE in 2017 and for LegCo in 2020.

32. Mr LAU Kong-wah said that following the promulgation of the timetable for implementing universal suffrage by NPCSC, he was optimistic about the constitutional development in Hong Kong. Having listened to views of members

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expressed at the meeting, he, however, was pessimistic whether progress could be made on the constitutional development in 2012. According to his observation, members had set many hurdles for the electoral methods for 2012 to roll forward to a midway point and these hurdles included the following –

(a) LSD would not support a proposal other than the one to implement dual universal suffrage in 2012;

(b) Democratic Party would not discuss the two electoral methods for 2012 unless the Administration had put forth a proposal for implementing universal suffrage for CE in 2017; and

(c) Dr Margaret NG would not support any electoral proposal which sought to retain or expand the FC system.

33. Mr LAU said that although DAB did not agree entirely with the 2005 proposed package, it had supported the proposal having considered the aspiration of the general public. He wondered whether the Administration could proceed further in the light of the hurdles set by some members. He further asked about the action to be taken by the Administration if Members refused to compromise their stances on the two electoral methods for 2012.

34. Mr CHAN Kin-por said that if members continued to adopt a confrontational attitude, it would not be conducive to constitutional development in Hong Kong. He urged members to set aside their own interests and discuss in friendly terms on the two electoral methods for 2012 with a view to coming up with a package of proposals that was acceptable to all.

35. SCMA said that although the stance of pan-democratic Members had indeed created additional difficulties for the reaching of a mainstream view on the two electoral methods for 2012, he was not too pessimistic about the constitutional development. He remained optimistic that progress could be made in areas of common interest. Taking the LegCo election as an example, there were views that the size of LegCo should be expanded in 2012. It would be in Members' interest to consider how the democratic elements in FC election should be enhanced and how the additional FC seats should be allocated. SCMA said that the work of the Administration, political parties and Members on constitutional development should be built on mutual trust and understanding. He pointed out that the Executive and the Legislature would be making history if consensus could be reached on the two electoral methods for 2012. The Executive and Legislature could prove to the community that they had the ability and determination to take forward constitutional development in accordance with the mechanism for amending the electoral methods provided in Annexes I and II of the Basic Law.

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V. Public consultation on prisoners' voting right

[Consultation Document on Prisoners' Voting Right, LC Paper Nos. CB(2)829/08-09(05) and (06) and IN04/08-09]

Briefing by the Administration

36. SCMA introduced the Administration's paper which summarised the content of the Consultation Document on Prisoners' Voting Right (the Consultation Document) [LC Paper No. CB(2)829/08-09(05)]. He said that in response to the ruling of the High Court that the existing across-the-board disqualification of prisoners from registration and from voting were unconstitutional, the Administration had formulated policy options on the relaxation of the relevant restrictions for public consultation. Taking into account the overseas arrangements for prisoners' voting and the circumstances in Hong Kong, the following policy options were identified –

(a) Option One was to remove the existing disqualification provisions in section 53(5)(a)-(b) of the Legislative Council Ordinance (Cap. 542) (LCO), which had been ruled by the Court as unconstitutional. The disqualification of persons convicted of election-related or bribery offences under section 53(5)(c) of LCO would remain.

(b) Option Two was to disqualify prisoners from voting if they were serving a sentence of imprisonment for a sufficiently long period (for example, 10 years or over). The length of sentence was used as a criterion to distinguish serious offences from less serious ones.

(c) Option Three was to disqualify prisoners from voting if they were serving a sentence of imprisonment for a sufficiently long period (for example, 10 years or over) while enabling them to resume the right to vote when they were serving the last few years of imprisonment (for example, during the last five years).

37. Members also noted that the LegCo Secretariat had prepared an updated background brief on voting rights of prisoners for members' reference [LC Paper No. CB(2)829/08-09 (06)].

Discussion

38. Mr CHEUNG Man-kwong said that ample justification must be given if restrictions were to be imposed to deprive a prisoner of the right to register as an elector and the right to vote. The Administration had to be cautious of where a cut-off line should be drawn, how it should be drawn and why it should be drawn. For instance, he supported the Administration's proposal that persons convicted of election-related or bribery offences should be disqualified from voting within three years after such conviction because it was necessary to protect the integrity of the

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electoral system. However, some of the justifications provided in the Administration's paper, such as preventing crime, enhancing civic responsibilities and respecting the rule of law, were too abstract. The Administration should make reference to the justifications adopted by overseas countries in imposing restrictions and put forth more specific justifications that would be readily understood and accepted by the public. He was concerned that if the justifications for imposing restrictions were not convincing, it would give rise to more judicial reviews.

39. SCMA said that for countries which banned prisoners who had committed serious offences from voting, the justification was that they had violated the contract with the community and failed to discharge their responsibility as citizens. As regards the severity of an offence which warranted a convicted person to be deprived of voting right, the Administration had not come up with any proposal after studying overseas practices. The Administration, however, had made reference to overseas countries which adopted a more relaxed approach in disqualifying prisoners' voting right. In Australia, a person serving a sentence of imprisonment for a term exceeding 36 months was not entitled to register as an elector, which tied in with the general election cycle there which was held once every three years. In Greece, persons sentenced to a term of over 10 years were deprived of the voting right. SCMA pointed out that the policy options proposed for Hong Kong were by international standard very lenient. The length of sentence was used as a criterion to distinguish serious offences from less serious ones. The Administration would listen to members' views and continue to study the various practices adopted by overseas countries.

40. Mr Ronny TONG said that prisoners' right to vote was provided in Articles 25, 26 and 39 of the Basic Law. That being the case, the Administration should remove all the existing restrictions on prisoners' right to vote, including the disqualification of persons convicted of election-related or bribery offences under section 53(5)(c) of LCO. In his view, the three policy options proposed by the Administration were without basis. He pointed out that a person, even if he was imprisoned, should still have the right to enjoy the services provided by LegCo Members and to protect the interest of his family by voting in an election.

41. SCMA said that the Administration also upheld the principle that the restrictions to be imposed, if any, on prisoners' voting right must be constitutional. While the Court had ruled that the existing across-the-board disqualification of prisoners from registration and from voting were unconstitutional, it had not suggested that some form of restrictions on voting could not be imposed on prisoners. It was for the Executive and the Legislature to decide on reasonable restrictions, if any. As the issue was about human rights, the Administration had therefore proposed three policy options for public consultation. The Administration had no preference on any of these options. SCMA further said that the Administration held the view that the disqualification provision in section 53(5)(c) of LCO should remain because it helped protect the integrity of

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the Legislature. In addition, the provision had not been challenged in the relevant judicial review cases.

42. Mr IP Kwok-him enquired how the Administration would ensure that the restrictions imposed on prisoners' rights to register as electors and to vote, as proposed in the three policy options, would not be subject to legal challenge in future.

43. SCMA said that when the Administration introduced the amendment bill into LegCo, it would spell out clearly the justifications for imposing the restrictions. In the event that judicial reviews were sought to challenge against these restrictions, the Administration would be able to provide justifications to the court.

44. Ms Emily LAU held the view that restrictions should not be imposed on prisoners' right to vote. She said that prisoners were already serving their sentences for the offences committed and there was no reason to impose additional penalty. If the Administration decided to impose restrictions on prisoners' right to vote, it had to provide ample justification. She also expressed concern about the tight timetable for conducting the public consultation and enquired about the arrangement for consulting prisoners and their families. She also asked whether the Administration would consider arranging prisoners to vote one or two days in advance so that more resources could be deployed to ensure that the arrangement would not pose concerns on public safety and security.

45. SCMA said that when the Panel discussed the possible policy options for relaxing the disqualification provisions at the last meeting, members had requested the Administration to expedite the relevant legislative process so that prisoners could enjoy their long lost rights. The Administration had explained that the public consultation exercise would last about six to eight weeks. He further said that the Correctional Services Department (CSD) had distributed the Consultation Document to prisoners on request and the Administration had also invited views from organisations which represented the interest of prisoners or ex-prisoners. At present, the Registration and Electoral Office (REO) was working with the relevant law enforcement agencies on the security arrangements for prisoners' voting. Regarding arranging advance polling for prisoners, SCMA cautioned that implications on security and secrecy of votes must be considered seriously because the longer the ballot papers were kept, the higher the risks in terms of security and secrecy.

46. Ms Emily LAU requested the Administration to provide information on the consultation conducted by CSD and the response of the prisoners in due course.

47. Ms Audrey EU enquired about the security and voting arrangements for prisoners and remanded persons to exercise their voting right. She also enquired about measures to safeguard the secrecy of votes.

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48. SCMA said that in the past few months, REO had been discussing with the relevant law enforcement agencies on the practical arrangements under which prisoners and remanded persons might cast their votes in an election. Irrespective of whether a mobile polling station would be arranged or polling stations would be set up inside prisons, REO would ensure that candidates and election agents would be able to observe the poll. To protect the secrecy of votes, consideration would be given to transfer the ballot papers cast by prisoners and remanded persons to the relevant counting stations and mix them with other ballot papers before counting.

49. Ms Cyd HO said that she would like to apologise to the public for overlooking the issue of prisoners' right to vote when LCO was scrutinised by LegCo. Referring to the policy options put forth by the Administration which proposed to disqualify prisoners from voting based on length of sentence, Ms HO held the view that the disqualification should preferably be based on specific crimes. She enquired overseas practices in this regard. She said that if mobile polling stations would be arranged for prisoners, the same should be arranged for patients and medical staff in hospitals.

50. SCMA said that in Germany, the disqualification from voting could be handed out by the Court for crimes such as treason, electoral fraud, and intimidation of voters; the latter of which was similar to the disqualification provision in section 53(5)(c) of LCO. The Administration would consider all the views received during the public consultation exercise, including the proposal to deprive prisoners' right of voting based on specific offences. As regards the voting arrangements for patients and medical staff, REO would take that into account when considering the practical arrangements for an election.

51. Chief Electoral Officer supplemented that when formulating the practical voting arrangements for prisoners, REO would take into account the public views in the current public consultation exercise. REO was also working out with the law enforcement agencies on the practical voting arrangements, including setting up dedicated polling stations in law enforcement premises, to facilitate remandees and detainees to vote in the Shatin District Council By-election to be held on 29 March 2009.

52. Dr Priscilla LEUNG enquired about the practices in the United Kingdom (UK) and United States (USA). She held the view that the practice adopted by Germany under which the disqualification from voting would be handed out by the Court was worth considering.

53. SCMA responded that in the UK, the majority of the prisoners were not entitled to vote. On 6 October 2005, the Grand Chamber of the European Court of Human Rights concluded that the UK's policy on prisoners' voting right was in breach of the European Convention on Human Rights and Fundamental Freedoms.

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In response, the UK government had proposed a two-stage consultation process before putting the proposals to the Parliament. The first stage was concluded in March 2007 and it was uncertain when the second stage consultation would begin. In the USA, the majority of its states did not allow prisoners to vote. SCMA said that in Hong Kong, if restrictions were to be imposed on prisoners, objective criteria would be stipulated in law for the Court to follow. For instance, the disqualification would be based on length of sentence or nature of the offence.

54. Mrs Sophie LEUNG said that in deciding whether restrictions should be removed for prisoners' right to vote, it would be useful for members to understand relevant overseas practices as they were developed over time based on the experiences as well as social and historical developments of the relevant countries.

55. Ms Miriam LAU considered that as liberal countries such as France and Australia had imposed restrictions on prisoners' right to vote, it would be useful if the Administration could provide more information on the reasons for the UK and the USA to deprive prisoners of voting right, and the practices in Asian places such as Thailand, Indonesia, Taiwan, etc. She added that REO must ensure that the polling arrangements to be made for prisoners would be user friendly.

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56. SCMA responded that the Administration would study more about overseas practices and their historical development. It would provide further information to the Panel, if available.

57. Ms Audrey EU was of the view that the Panel should receive views from deputations on prisoners' voting right and views received should be forwarded to the Administration for consideration. The Chairman suggested that as the public consultation exercise on the Consultation Document would end on 23 March 2009, the Panel would invite written views from persons/organisations which had previously given views to the Panel on the subject. Members agreed.

(*Post-meeting note*: On the instruction of the Chairman, an invitation for public views on the Consultation Document was also posted on the LegCo website.)

VI. Rules and regulations under the Race Discrimination Ordinance

[LC Paper Nos. CB(2)829/08-09(07) and (08)]

58. Under Secretary for Constitutional and Mainland Affairs (USCMA) briefed members on the Race Discrimination (Proceedings by Equal Opportunities Commission) Regulation (the proposed Regulation), which empowered the Equal Opportunities Commission (EOC) to bring certain proceedings under the Race Discrimination Ordinance (Cap. 602) (RDO) in its own name [LC Paper No. CB(2)829/08-09(07)]. USCMA added that the corresponding regulation under the Disability Discrimination Ordinance (Cap. 487) (DDO) contained more

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procedural details, including that EOC had failed to effect a settlement and had established that the victim did not wish to bring proceedings in his own name before EOC could bring proceedings. However, the circumstances under which EOC could bring proceedings under the proposed Regulation was consistent with the corresponding regulations under the other two anti-discrimination ordinances.

59. Chief Legal Counsel of EOC (CLC) briefed members on the two sets of Rules, namely the Race Discrimination (Formal Investigations) Rules and the Race Discrimination (Investigation and Conciliation) Rules, to be made under RDO as set out in the EOC's paper [LC Paper No. CB(2)829/08-09(08)]. He said that the two sets of Rules were materially the same as the corresponding rules under the Sex Discrimination Ordinance (Cap.480) (SDO), DDO and the Family Status Discrimination Ordinance (Cap. 527) (FSDO) respectively.

The proposed Regulation

60. Members noted that the proposed Regulation sought to empower EOC, in case where a victim of racial discrimination, harassment and vilification might bring proceedings under section 70 of RDO but had not done so, to bring proceedings as if EOC had been that person. The proposed Regulation was modelled on the corresponding regulations under SDO and FSDO.

61. Mr CHEUNG Man-kwong was of the view that the threshold for EOC to provide legal assistance to a person who wished to institute legal proceedings under anti-discrimination ordinances was too high. He said that he had received a complaint from a teacher who had sought assistance from EOC to lodge a case against a headmaster who had repeatedly warned her not to wear trousers, but only skirts or dresses in school. In his view, the headmaster's act was in breach of SDO. However, EOC had declined to pursue the case in court when conciliation between the two parties failed. The claimant eventually had to resort to legal aid to challenge the act in court. Mr CHEUNG stressed that people had high expectation on EOC to bring those who had breached anti-discrimination laws to justice. He pointed out that Legal Aid Department would approve an application for legal aid if the case was meritorious. He further enquired about the number of applications received by EOC seeking legal assistance.

62. CLC said that EOC had received a total of 37 applications seeking legal assistance to deal with claims arising from sex, disability and family status discrimination in 2008. Legal assistance had been granted in about 42% of the applications. A majority of these claims were resolved by settlement after legal assistance was provided. He did not recall that EOC had to give assistance in a trial for any assisted persons under SDO in the last two years.

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63. USCMA explained to the Panel that the proposed Regulation sought to empower EOC, in case where a victim of racial discrimination, harassment and vilification might bring proceedings under section 70 of RDO but had not done so, to bring proceedings as if EOC were that person. The proposed Regulation was modelled on corresponding regulations made under the respective anti-discrimination ordinances. The function of EOC in providing legal assistance to victims of discrimination was distinct from its power to institute proceedings as if it were the victim under the regulations of respective anti-discrimination ordinances, including the proposed Regulation when it came into operation.

64. Ms Audrey EU said that she had received similar complaints that the threshold adopted by EOC to grant approval for legal assistance was too high. She shared the concern expressed by Mr CHEUNG Man-kwong. The same was applicable to the proposed Regulation under which a claim had to be "well-founded" for EOC to bring proceedings in its own name. Ms EU enquired whether EOC would bring proceedings before the Court only if there were very good prospects of winning and whether it would reject an application for legal assistance if a complainant had refused to settle the dispute by conciliation in the first place. She also enquired about the source of funding for legal expenses.

65. CLC explained that EOC did not have an action fund for legal assistance. Under the present envelope funding approach, EOC's legal expenses in relation to giving legal assistance would be covered in the Recurrent Account. USCMA supplemented that the recurrent provision for EOC was about $70 million in 2008-2009. If the funding for legal expenses from the Recurrent Account was insufficient, EOC could resort to its Reserve which was capped at a ceiling of 25% of the annual recurrent subvention. The Reserve was currently around $17 million. In response to Mr LEUNG Kwok-hung, USCMA confirmed that EOC had been given additional provision to make preparation for implementing RDO in 2009.

66. Ms Emily LAU said that she would not oppose the proposed Regulation, but it would serve little useful purpose if EOC continued to apply high threshold for the provision of legal assistance under RDO. She considered that EOC should adopt the criteria used by the Legal Aid Department in approving applications for legal aid. Ms LAU suggested that the Panel should follow up issues relating to provision of legal assistance by EOC at a future meeting.

67. Mr CHEUNG Man-kwong said that he had reservations about supporting the proposed Regulation if the threshold for providing legal assistance remained high. He also indicated that he would propose setting up a subcommittee on the proposed Regulation when it was introduced into LegCo. USCMA suggested that members might wish to follow up the issues on legal assistance at a Panel meeting in future.

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68. The Chairman requested EOC to provide the following information as requested by members –

(a) factors considered by EOC to provide legal assistance for a case;

(b) whether EOC would consider providing legal assistance for a case if a complainant had refused to settle the dispute by conciliation in the first place;

(c) number of cases where legal assistance was provided by EOC, the overall successful rate, and the litigation costs involved; and

(d) financial arrangement for funding legal expenses.

69. The Chairman concluded that members could decide how to follow up the issue when the requisite information was made available.

(*Post-meeting note*: The information provided by EOC was issued to members vide LC Paper No. CB(2)1093/08-09 on 16 March 2009.)

The two Rules

70. Referring to section 3 of the Race Discrimination (Investigation and Conciliation) Rules regarding representative complaints, Mr Ronny TONG raised the following questions –

(a) whether a representative complaint alleging that another person had done an unlawful act could be lodged by a person who was a legal representative on behalf of another person or other persons aggrieved by the act;

(b) whether the respondent who had allegedly done an unlawful act could instruct a legal representative;

(c) why there was a need for an aggrieved person to represent other aggrieved persons to lodge a complaint;

(d) whether subsection (1)(a) and (b) could be combined to cover a person and other persons aggrieved by the act done by a respondent; and

(e) whether "the same person" referred to in subsection (2)(a) meant the aggrieved person or the respondent.

Mr TONG also enquired why the standard of burden of proof had not been stipulated in section 8 concerning the procedure at conference.

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71. CLC made the following responses –

(a) both the aggrieved person and the respondent could instruct a legal representative to represent him in a claim;

(b) "the same person" referred to in subsection (2)(a) meant the respondent;

(c) an aggrieved person could represent other aggrieved persons to lodge a complaint against the same person, similar to a class action; and

(d) a wrongdoing under RDO was a tortious act and the civil standard of burden of proof applied, which was also not spelt out in SDO, DDO and FSDO.

72. The meeting ended at 5:23 pm.

Council Business Division 2
Legislative Council Secretariat
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