

立法會
Legislative Council

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LC Paper No. CB(2)2066/08-09
(These minutes have been seen
by the Administration)

Panel on Constitutional Affairs

Minutes of meeting
held on Monday, 16 March 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 LAU Wong-fat, GBM, GBS, JP
Hon Miriam LAU Kin-ye, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Timothy FOK Tsun-ting, GBS, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon 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

Dr Hon PAN Pey-chyou
Dr Hon Samson TAM Wai-ho, JP

Member attending : Hon LEE Cheuk-yan

Members absent : Hon LI Fung-ying, BBS, JP
Hon Mrs Regina IP LAU Suk-yee, GBS, JP

Public Officers attending : Item III

Mr Stephen LAM Sui-lung
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

Item IV

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

Mr Raymond TANG Yee-bong
Chairperson, Equal Opportunities Commission

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

- Attendance by invitation** : Dr Robert CHUNG
Director of Public Opinion Programme, the University of Hong Kong
- Hong Kong Association for Democracy and People's Livelihood
- Mr WANG Shing-mo
- Hong Kong Human Rights Monitor
- Mr LAW Yuk-kai
Director
- Miss TSUI Ka-wing
Project Officer
- 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 Fanny TSANG
Legislative Assistant (2)3

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I. Information papers issued since the last meeting

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

II. Items for discussion at the next meeting

[LC Paper Nos. CB(2)1050/08-09(01) and (02) and CB(2)1103/08-09(01)]

2. Members agreed to discuss at the next meeting on 20 April 2009 the following items proposed by the Secretary for Constitutional and Mainland Affairs (SCMA) -

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- (a) Results of the public consultation on prisoners' voting right and the proposed way forward; and
- (b) An outline of the topics in the second report on the Hong Kong Special Administrative Region under the Convention on the Rights of the Child.

3. Referring to her letter tabled at the meeting (LC Paper No. CB(2)1103/08-09(01) issued on 17 March 2009), Ms Emily LAU said that according to the press report by Wen Wei Po on 11 March 2009, Mr LI Guikang, Deputy Director of the Liaison Office, said that the Government of the Hong Kong Special Administrative Region (HKSAR) and the Liaison Office of the Central People's Government in HKSAR (the Liaison Office) had reached a "10-point" agreement on expanding the functions and role of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference (CPPCC). As explained in her letter, such an agreement would impact on the principle of "One Country, Two Systems" and the autonomy of Hong Kong. She suggested holding a special meeting to discuss the issue and requested the Administration to provide a paper to -

- (a) clarify whether a "10-point agreement" or consensus on expanding the role of Hong Kong deputies to the National People's Congress (NPC deputies) and CPPCC members had been reached between the HKSAR Government and the Liaison Office;
- (b) explain the position of the Administration on (a) above and its view on expanding the role of NPC deputies and CPPCC members; and
- (c) liaise with the Liaison Office to obtain the speaking notes of Mr LI Guikang and the relevant extracts from the minutes of the meeting of CPPCC held in March 2009.

4. The Chairman invited members' views on when the issue should be discussed by the Panel.

5. Echoing the views of Ms LAU, Ms Cyd HO said that many NPC deputies and CPPCC members were former senior government officials, existing Members of the Legislative Council (LegCo) and the Executive Council. She queried why there was a need to enhance their participation in local affairs by appointing them to serve on consultative and advisory bodies or assume the posts of political officials.

6. Mr CHEUNG Man-kwong said that according to the press reports in Wen Wei Po, the remarks made by Mr LI Guikang were inconsistent. Mr LI mentioned at the meeting of CPPCC held on 10 March 2009 that a "10-point" agreement had been reached between the HKSAR Government and the Liaison

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Office. A CPPCC member later clarified that a consensus, rather than an agreement, had been reached. On 16 March 2009, the newspaper reported that Mr LI had denied that such an agreement had ever been made. Although the Government had clarified that it had not made an agreement with the Liaison Office, the Administration had the duty to investigate into the matter and report it to Members. He stressed that it was incumbent upon the Administration to obtain the speaking notes and relevant part of the minutes from the Liaison Office.

7. Ms Audrey EU said that the Civic Party was concerned about the matter. She said that SCMA should clarify the position of the Administration at this meeting and follow up by a written response to facilitate discussion at a future meeting.

8. Mr WONG Kwok-kin said that he was a NPC deputy and yet he had never heard of the remarks made by Mr LI while attending meetings on the Mainland. He would like to listen to the response of the Administration.

9. Mr IP Kwok-him said that should members wish to follow up, the issue should be included as an agenda item for discussion at a future Panel meeting.

10. Mr WONG Yuk-man said that he failed to see why there was so much concern about NPC deputies and CPPCC members meddling in local affairs because it was common knowledge that they were identified by the Liaison Office and the Communist Party for appointment. In his view, the Central People's Government (CPG) had all along meddled in local affairs and undermined the principle of "One Country, Two Systems", for example, the re-interpretation of the Basic Law by the Standing Committee of NPC. Referring to the remark of Mr CHAN Kam-lam as reported in Wen Wei Po that the HKSAR Government, by nominating CPPCC members, would be incorporated into the administrative structure of CPG and help elevate the status of Hong Kong, Mr WONG said that it was a known fact that CPPCC only served a window-dressing purpose and had no substantive power in China's political system. He, however, considered that the Administration should clarify its position on the matter in a written statement.

11. Mr Ronny TONG said that while the Administration should clarify as a matter of fact there was such an agreement or consensus, the Administration should also seek legal advice from the Department of Justice and explain the role of NPC deputies and CPPCC members under the Basic Law in clear terms.

12. In response to members, SCMA made the following points -

- (a) in dealing with the internal affairs of Hong Kong, CPG and the HKSAR Government abided by the Basic Law and the principle of "One Country, Two Systems";

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- (b) the Administration had already clarified its position the week before that it had not reached any agreement or consensus with the Liaison Office on the expansion of function and role of NPC deputies and CPPCC members;
- (c) under the existing practice, the HKSAR Government would liaise with the Liaison Office from time to time and discuss issues raised by NPC deputies and CPPCC members regarding cross-border co-operation matters between Hong Kong and the Mainland. The Chief Executive would meet with NPC deputies and CPPCC members twice a year to exchange views. A website had also been established to provide NPC deputies and CPPCC members with a readily available and convenient platform for giving advice;
- (d) NPC deputies and CPPCC members could participate in local affairs and committee work in the capacity of LegCo Members provided they were returned by election according to law. In appointing members to serve on consultative and advisory bodies, the major consideration of the HKSAR Government was the expertise and relevant experience of individuals, whether or not they were NPC deputies or CPPCC members was not a factor for consideration;
- (e) Annex I to the Basic Law provided that the Election Committee should comprise, among others, Hong Kong deputies to NPC and representatives of Hong Kong members of CPPCC; and
- (f) he would relay the views of members to the Government and would provide a paper to the Panel in due course.

13. The Chairman said that with a series of special Finance Committee meetings scheduled for March and the Easter Holiday coming up, the issue would be discussed at the next Panel meeting to be held on 20 April 2009. Members agreed.

III. Exit polls

Briefing by the Administration

14. SCMA introduced the Administration's paper (LC Paper No. CB(2)1050/08-09(03)) which set out the existing regime regarding the regulation of exit polls and the issues relating to exit polls in the 2008 LegCo Election.

15. Members noted the following papers on the subject under discussion -

- (a) background brief prepared by the LegCo Secretariat (LC Paper No. CB(2)1050/08-09(04));

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- (b) submission from Hong Kong Research Association (HKRA) (LC Paper No. CB(2)1050/08-09(05)); and
- (c) submission from Hong Kong Investigation and Research Centre (HKIRC) (LC Paper No. CB(2)1050/08-09(06)).

Presentation of deputations' views

16. Dr Robert CHUNG, Director of Public Opinion Programme of the University of Hong Kong (POP), presented his views as detailed in the submission (LC Paper No. CB(2)1083/08-09(01)). He said that it was no longer a secret that candidates and political parties in Hong Kong had used exit polls to plan their electioneering strategy before the close of poll. During the municipal council elections in 1995, another academic researcher had recorded that about 60% of the candidates from one particular political party had conducted exit polls and the data collected had been sent back to their headquarters for instant analysis and manpower planning. In the 2008 LegCo Election, a columnist who was a former editor of the Hong Kong Economic Journal had expressed the view that while a political party could deploy resources to conduct extensive exit polls on the polling day, it would create unfairness in an election if other political parties did not have the resources to do so. Dr CHUNG said that setting aside the past, he hoped that relevant stakeholders could work together to develop an exit poll system of international standard to safeguard freedom of expression, academic freedom, people's right to know and professional practice.

17. Mr WANG Shing-mo presented the views of Hong Kong Association of Democracy and People's Livelihood (ADPL) as detailed in the submission (LC Paper No. CB(2)1083/08-09(02)). He expressed concern that exit polls had become a tool for political parties to plan their electioneering strategy before the close of poll and had created unfairness in an election. He pointed out that in the 2008 LegCo Election, only one out of the 13 exit pollsters had published the exit poll results. In addition, at least five pollsters were found to be associated with leftist organisations or the Democratic Alliance for the Betterment and Progress of Hong Kong (DAB). The expenses incurred, however, had not been included as part of election expenses. ADPL proposed, among others, that exit polls should be conducted by tertiary institutions only.

18. Mr LAW Yuk-kai presented the views of the Hong Kong Human Rights Monitor (HRM) as summarised below -

- (a) under the list voting system for geographical constituency elections, the data collected from exit polls could help candidates plan their vote allocation strategy. While it was a known fact that some candidates and the political party they associated with had mobilised resources to conduct exit polls for the 2008 LegCo Election, no

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candidate had declared the expenses incurred for exit polls as part of election expenses. It called into question whether the 2008 LegCo Election had been fair;

- (b) in view of the unfairness, some electors had not responded to the questions posed by exit pollsters or given a misleading answer. This was tantamount to a vote of no-confidence in the Electoral Affairs Commission (EAC) and the Administration which had failed to put in effective measures to regulate the conduct of exit polls; and
- (c) to regain public confidence, EAC should consider the following measures to strengthen the regulation of exit polls: to prohibit the publication and broadcast of exit poll results before the close of poll; to require exit pollsters to undertake not to use the result of exit polls for electioneering purpose and to subject a breach of the undertaking to criminal sanction; and to safeguard the right of the public to know by disclosing to the public 10 days before the poll the background of the pollsters, purpose of the polls, etc. EAC should also encourage pollsters to attend forums to explain to the public the exit polls they conducted.

Discussion with members

19. Mr IP Kwok-him sought clarification from ADPL on which exit pollster was associated with DAB. Mr WANG Shing-mo said that according to the information provided by Power for Democracy, the Hong Kong Development Research Association had conducted exit polls in Kowloon West in the 2008 LegCo Election. One of its members, Mr TAM, was the Deputy Chairman of Hong Kong Youths Unified Association. The Chairman of Hong Kong Youths Unified Association was a member of DAB. Mr IP Kwok-him said that the information given by ADPL was misleading and there was no such a Mr TAM in DAB.

20. Ms Emily LAU said that in his submission dated 6 October 2004, Dr Robert CHUNG took the view that he did not object to any political party or other agencies conducting exit polls. What he opposed was the use of dishonest means to gauge voters' opinions for electioneering purpose. Dr CHUNG had further said that if a society's election results hinged on the emotional response of electors' at the last stage, for instance by assassinating a candidate, that would be a great misfortune. Since the Hong Kong situation was unique and certain political party was very powerful, Ms LAU sought advice from Dr CHUNG on the way forward for the development of exit polls.

21. Dr Robert CHUNG said that in the past 10 years, exit polls had been an issue of concern because the interest of political parties and candidates was at stake. In recent years, the problem had become more acute because the conduct

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of exit polls had become institutionalised. To address the problem, the professional development of exit poll should surpass the interests of political parties. It would be useful to make reference to overseas practices if Hong Kong was to develop its own exit poll system. He supported the approach adopted by some western countries which imposed minimum restriction to regulate the conduct of exit polls and the use of exit poll results. These countries could do so because their political and social systems were sophisticated. Exit pollsters were required to follow a code of practice and the media also exercised self-discipline by not releasing the election forecast before the close of poll. As to whether the access of exit poll results by certain candidates would create unfairness to others who did not have such an access, it was difficult to draw a conclusion because before exit polls became institutionalised, electors' information had also been collected by interested parties outside the polling stations for electioneering purpose. In his view, all stakeholders, including Members, political parties, media and research organisations, should collaborate to work out a code of practice for the conduct of exit polls.

22. Mr Ronny TONG expressed disappointment that no representative of HKIRC, which had launched personal attacks on him in its submission, attended the meeting. He welcomed the submission of HKRA which made available the analysis report on the exit polls conducted on the 2008 LegCo election. He sought views from Dr Robert CHUNG on the following -

- (a) the estimated financial resources required for HKRA to conduct exit polls on 198 polling stations involving 1 286 interviewers and about 150 000 respondents in the 2008 LegCo election;
- (b) whether it was meaningful to conduct exit polls with a sample size as large as 150 000 from the academic point of view; and
- (c) whether legislation should be introduced to regulate the conduct of exit polls, whether pollsters should be required to disclose exit poll results after the close of poll, and if exit polls were conducted for electioneering purpose, whether they should be counted as part of election expenses.

23. Dr Robert CHUNG said that the operation and concept adopted by HKRA in conducting exit polls were different from those of POP. POP adopted a scientific sampling method with the use of a relatively complex and long questionnaire and a small sample size. The purpose was to collect more information at a relatively short time so as to minimise disturbance to electors. Setting aside the exit poll results of the 2008 LegCo Election, the credibility of which had been called into question because electors had not been co-operative, the exit poll conducted by POP for the 2004 LegCo Election, despite a small sample size, was as accurate as the ones conducted by other pollsters involving a large sample size. Dr CHUNG said that he was not in a position to estimate the

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expenses incurred by HKRA in conducting exit polls for the 2008 LegCo Election because there were many other variables involved, or to explain why other pollsters chose to use a large sample size in their exit polls. His own experience was that an interviewer was paid \$600 per day in the 2008 LegCo election. In his view, exit polls could be conducted by any organisation and should not be restricted to tertiary institutions only. As suggested earlier, Hong Kong should aim at the compilation of a code of practice to regulate the conduct of exit polls.

24. Mr LAU Kong-wah considered that HKIRC had given a balanced view on exit polls in its submission. He also welcomed the view of Dr Robert CHUNG that minimum restrictions should be imposed on the conduct of exit polls. As Dr CHUNG had mentioned that using exit poll results to plan electioneering strategies had been carried on for more than 10 years, he would like to seek Dr CHUNG's view on the tactics employed by some candidates telling electors that they were falling behind at an election. He recalled that in the 2007 LegCo By-election, a major newspaper had issued a special edition reporting that one of the candidates was falling behind at the election. He pointed out that unless the newspaper had conducted an exit poll, it would not have known that the candidate was falling behind at the election. In addition, the expenses incurred for distribution of the special edition and conducting the exit poll had not been counted as election expenses. Mr LAU also sought views from Dr CHUNG on the action taken by some candidates such as Mr Ronny TONG who had appealed to electors to give false information to pollsters.

25. Mr Ronny TONG clarified that neither him nor the Civic Party had appealed to electors to give false information to pollsters. He, however, had advised electors that they had the right to refuse answering the questions on privacy ground. Ms Emily LAU said that since the Administration and EAC had not responded to pan-democratic Members' request for more stringent measures to regulate the conduct of exit polls in the 2008 LegCo Election, pan-democratic Members had decided to take the matter in their own hands and had appealed to voters not to respond to pollsters. She stressed that pan-democratic Members had not appealed to electors to give false information.

26. Dr Robert CHUNG said that when a candidate claimed that he was falling behind at an election, he either had the exit poll results to justify such a claim or he had made such a claim without basis to serve the purpose of soliciting more votes. In either case the candidate was acting dishonestly because POP had never disclosed exit poll results to any candidate before the close of poll. He said that in future when a candidate claimed that he was falling behind at an election, he should have facts to support the claim. As to those people who appealed to electors to give misleading answers to pollsters, they had damaged the credibility of exit poll results and also impeded democratic development.

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27. Dr Priscilla LEUNG said that while she disliked exit poll, she respected the views of those who supported it provided that the conduct of exit polls was not restricted to tertiary institutions only. She said that about two months before the polling day, the media had already published various opinion polls predicting the performance of candidates at an election. In her view, the specific remarks made or predictions on the performance of individual candidates by the media would influence electors' voting preference and affect election results. She personally was disturbed by these reports and considered that their impact was more far-reaching than that of exit polls because electors would be subject to the influence of exit poll results for only a few hours on the polling day, while the reports made by media could influence electors for months. If the use of exit poll results for electioneering activities before the close of poll should be criminalised, Dr LEUNG called into question whether the same should apply to the publication of opinion poll results by the media. She also enquired about the media sponsoring POP in conducting the exit poll and queried why POP had released the exit poll results to the media sponsors before the close of poll on 7 September 2008.

28. Dr Robert CHUNG said that he was against the proposal to legislate against the use of exit poll results for electioneering activities before the close of poll. He reiterated his view that imposing stringent measures to regulate exit poll was not conducive to freedom of expression and academic freedom. He considered that the present arrangements under which candidates were required to declare their election expenses and would be reprimanded if they made false statement had provided sufficient safeguard against malpractices. Dr CHUNG said that to maintain absolute neutrality, he had never released the results of exit poll to candidates before the close of poll. The exit poll conducted by POP was sponsored by the electronic media and they had made an internal agreement whereby the media sponsors would receive a preliminary forecast of the election results at around 9:00 pm and they would not reveal the results until after the close of poll. For the 2008 LegCo Election, POP advanced the release the exit poll results to its media sponsors to 8:00 pm on 7 September 2008 having regard to public sentiment and overseas practices. He pointed out that early release of exit poll results to the media was not uncommon in western countries. In fact, the world trend was against, as a matter of principle, regulation of the conduct of the poll and reporting of its results. In the United States, exit pollsters collected information throughout the polling day. When exit poll results were released to the media in the East coast, voting was still going on in the West coast. The crux of the matter was whether the media could exercise professional self-discipline and not publicise the prediction of an election based on exit polls before the close of poll.

29. Ms Miriam LAU said that the Liberal Party had neither conducted exit poll nor spread the news that its candidates were falling behind at an election. She supported the views of Dr Robert CHUNG, especially the view that if a society's election results hinged on the emotional response of electors' at the last stage, that would be a great misfortune. She sought Dr CHUNG's view on how to upgrade professional self-discipline in the conduct of exit polls in Hong Kong.

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30. Dr Robert CHUNG said that to upgrade professional self-discipline in the conduct of exit polls, the role played by the media was very important. It would be useful if some media organisations with credibility would undertake to comply with the international code of practice for exit polls. He added that the international code of practice regulated at least three types of organisations, namely research organisations, media and sponsors of exit polls. To enhance credibility and professionalism in the conduct of exit polls in Hong Kong, a code of practice should be developed through the concerted effort of these organisations. He was willing to instigate the discussion in this regard. He added that reference could be made to the international code of practice for exit polls.

31. Mr LAU Kong-wah sought further views from Dr CHUNG on the following -

- (a) the view that the conduct of exit polls should not be restricted to tertiary institutions;
- (b) the view that either no party or any party could conduct exit polls on the polling day; and
- (c) the view that Dr Robert CHUNG was not suitable for conducting exit polls because his inclination towards pan-democratic Members called into question whether the exit polls he conducted could remain impartial.

32. Ms Cyd HO, Ms Emily LAU and Mr Ronny TONG clarified that they did not have a close relationship with Dr Robert CHUNG. Dr Robert CHUNG also clarified that he had kept his contacts with any political parties or candidates to the minimum to avoid unnecessary misunderstanding. Despite that, he and some political parties sometimes shared the same view on some issues. The incorrect impression that he had a close relationship with pan-democratic Members was beyond his control. He said that from the professional point of view, an exit poll should be conducted in a scientific and transparent manner. He did not support any proposal to impose more stringent measures to regulate the conduct of exit polls. In his view, exit polls should be regulated by a code of practice in future.

33. Ms Cyd HO said that exit polls had its value but it had become a tool for some political parties to plan their electioneering activities before the close of poll. She asked whether EAC or the Administration intended to introduce measures to regulate exit polls to cope with the changing environment. She believed that it was about time for the Administration to review the existing guidelines to allow the release of polling results before the close of poll so that all parties could have access to such information. She pointed out that in the United States, exit poll results were released in the West Coast and East Coast at different times and it did not appear that such a practice had influenced elector behaviour.

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34. Mr LEUNG Kwok-hung said that the Administration or the Independent Commission Against Corruption should investigate whether exit pollsters had provided certain political parties or candidates with exit poll results for planning electioneering strategies and whether the candidates procuring the polling services had included the expenses incurred as part of election expenses. He pointed out that any candidate who failed to declare such expenses should be held criminally liable. While he respected academic freedom, he would not accept the abuse of exit poll results.

Response of the Administration

35. SCMA thanked members and deputations for their views. He made the following responses -

- (a) Dr Robert CHUNG had placed emphasis on self-discipline by relevant parties on the conduct of exit polls. EAC and the Administration also hoped that exit pollsters and other relevant parties would comply with the guidelines on exit polls issued by EAC;
- (b) regarding the concern expressed by ADPL that apart from POP, other exit pollsters had not published their results, HKRA provided a comprehensive report analysing the findings of exit polls in its submission to the Panel and it was believed that other pollsters would make their own arrangements for making similar information available;
- (c) on members and deputations' concern about political parties using exit poll results to plan electioneering activities, the existing electoral laws required that expenses incurred by a candidate in procuring services, including survey and polling services, for electioneering purposes had to be included as part of election expenses. Non-compliance would constitute a criminal offence;
- (d) as some political parties had called for electors not to respond to pollsters in the 2008 LegCo Election which had affected the accuracy of exit poll results, he was glad to hear that political parties had not encouraged electors to give misleading answers when being interviewed;
- (e) EAC would follow up on any complaints received. To his understanding, EAC and the relevant law enforcement agencies were investigating into the complaint cases relating to the 2008 LegCo Election;

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- (f) the Administration considered that any person or organisation could conduct exit polls, provided that they would not use the findings to interfere with the election process by unduly influencing electors before the close of poll. In the 2008 LegCo election, the intention of Dr Robert CHUNG to advance the release of exit poll results to 12:00 noon to its media sponsors had aroused some concerns. Requiring pollsters to disclose polling results after the close of poll had been an established and effective practice for years; and
- (g) the research conducted by the Research and Library Services Division of the LegCo Secretariat revealed that western countries including Canada, United Kingdom, United States and Australia had no legislation to regulate the conduct of exit polls and the use of exit poll results. As there was already legislation governing election expenses relating to the use of exit poll results by political parties or candidates, the Administration would not consider legislating on exit polls at this stage. The Administration would continue to listen to the views concerning exit polls and consider the matter when the EAC Guidelines were updated prior to the next general election, along with other electoral arrangements.

IV. Revised Draft Code of Practice on Employment under the Race Discrimination Ordinance

[Annex A to LC Paper Nos. CB(2)265/08-09(03), CB(2)1050/08-09(07) and (08), CB(2)1083/08-09(03) and (04), and CB(2)1103/08-09(02)]

Briefing by the Equal Opportunities Commission (EOC)

36. Chairperson of EOC briefed members on the salient points of EOC's paper (LC Paper No. CB(2) 1050/08-09(07)) on the revised draft Code of Practice on Employment (the Code) under the Race Discrimination Ordinance (Cap. 602) (RDO). He said that EOC had conducted public consultation between October 2008 and January 2009 and had so far received a total of 88 submissions. EOC had also organised over 50 consultation meetings, of which 10 were dedicated to receive views from ethnic minorities. Substantial revision had been made to the first draft of the Code after taking into account the views received and making reference to the relevant codes adopted by overseas jurisdictions. Illustrations and examples were provided in the Code to demonstrate what would and would not constitute an unlawful act in employment situations. Given that RDO had yet to be fully implemented and EOC had not accumulated any experience in applying RDO, some examples were made up by EOC. Some illustrations were based on relevant case law in overseas jurisdictions with similar discrimination legislation. The illustrations used in the Code were intended to facilitate a general understanding of the principles of RDO. As to how a case would be handled by EOC in reality, it depended very much on the facts of each

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particular case. Chairperson of EOC stressed that it was not possible for EOC to provide an exhaustive list of illustrations and examples. EOC hoped that following the implementation of RDO, case law would be made available for future reference.

37. Chief Legal Counsel of EOC said that the wording and expressions in the first draft of the Code had been revised to emphasise the spirit of RDO in promoting racial equality in the workplace. Taking into account the views received, the contents on good employment procedures and practices had been substantially expanded. As regards the concerns expressed by members and the public about indirect discrimination relating to language and other employment issues, illustrations and examples derived from relevant case law were given to demonstrate how the principles for upholding racial equality might be applied in particular situations. Employers were encouraged to take positive action to promote racial equality and to make effort to accommodate cultural practices of employees. In brief, the revised draft Code had addressed the concerns raised by the public and members.

38. Members noted the following papers on the subject under discussion -

- (a) background brief prepared by the LegCo Secretariat (LC Paper No. CB(2)1050/08-09(08));
- (b) submission from Hong Kong Unison Limited (HKUL) (LC Paper No. CB(2)1083/08-09(03));
- (c) submission from Society for Community Organisation (SOCO) (LC Paper No. CB(2)1083/08-09(04));
- (d) joint submission from Hong Kong Unison and Hong Kong Human Rights Monitor (tabled at the meeting and issued to members vide LC Paper No. CB(2)1103/08-09(02) on 17 March 2009); and
- (e) letter dated 16 March 2009 from the Administration enclosing a note prepared by EOC on "Legal Assistance provided by EOC" (LC Paper No. CB(2)1093/08-09(01) issued on 16 March 2009).

Revised Draft Code

39. Ms Emily LAU requested EOC and the Administration to -

- (a) respond to the point raised by HKUL in its submission that all illustrations using "South Eastern Asian" should be amended to delineate the ethnic groups and to address them individually such as Filipinos, Indonesians and Pakistanis;

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- (b) respond to the submission of SOCO and the joint submissions of HKUL and HRM on public consultation on the revised draft Code;
- (c) advise whether EOC would publish the Code in six other common languages of ethnic minorities, i.e. Hindi, Indonesia, Nepali, Tagalog, Thai and Urdu; and
- (d) advise when EOC would draw up additional codes of practice under RDO in relation to housing, education and the provision of goods, facilities, services and premises.

40. Chairperson of EOC made the following response -

- (a) the point raised by HKUL relating to "South Eastern Asian" had already been addressed in the revised draft Code;
- (b) EOC had no strong view on the proposal of HKUL and HRM to conduct a series of consultations on the revised draft Code. It was for the Administration to consider whether another round of consultation would impact on the implementation of RDO which was scheduled for mid-2009;
- (c) while EOC was prepared to make available the Code in six other languages, Chinese and English were the official languages accepted by the court; and
- (d) EOC was not in a position to advise on the timeframe for drawing up the code of practice on other areas under RDO. Drawing up the Code prior to the implementation of RDO had already posed a great challenge to EOC. EOC had to accumulate more experience in applying RDO and the Code before proceeding further.

41. Under Secretary for Constitutional and Mainland Affairs (USCMA) said that EOC had already incorporated in the revised draft Code many of the recommendations made by SOCO, HKUL and HRM in their previous submissions. He suggested that EOC should examine how the revised draft Code could be further improved, taking into account the latest comments received. Where necessary, EOC should hold further discussions with individual organisations concerned. Given that the Administration's plan was to bring into operation all the provisions of RDO around mid-2009 after the Code had been issued by EOC, there might not be enough time to conduct another round of consultation. USCMA added that LegCo would have further opportunity to scrutinise the draft Code after it was introduced into LegCo.

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42. Mr LEE Cheuk-yan asked whether regulations and rules made under RDO, which were not related to employment issues, could be brought into operation as soon as practicable to avoid further delay. USCMA responded that the Administration had briefed the Panel on a regulation and two sets of rules to be made under RDO at the last meeting. The Administration had given notice to move a motion on the regulation for approval by LegCo with a view to bringing the regulation and all the provisions of RDO into operation at the same time.

43. Ms Miriam LAU expressed concern that the content of the Code was not easy to comprehend. An employer might have difficulty in determining what would and would not constitute an unlawful act in employment situations, not to mention that he might not be aware of the availability of the Code. She asked about the publicity launched by EOC to promote the Code to employers and whether a service centre would be set up to answer enquiries.

44. Chairperson of EOC concurred with Ms LAU that the Code was not easy to understand. He was not aware of any piece of legislation in which a code had to be written to teach people how the legislation might be applied before it was implemented. The ideal situation was to prepare a code after the legislation had been implemented for awhile and experience had been accumulated. It had been a taxing experience for EOC to make up the different scenarios which might happen in the employment field, not to mention that employers and the employees with different backgrounds reacted differently under different situations. EOC would promote understanding of the Code by holding discussion forums and workshops with employers and other relevant parties. He added that EOC already had an enquiry hotline in place.

45. Ms Miriam LAU said that while the illustrations could serve educational purposes, they were not all-embracing. Employers might understand one specific situation but not the others. It was therefore important to make employers understand how to prevent infringing the rights of a person of a different race in employment. She hoped that more resources would be allocated to enable EOC to organise workshops for employers and employer associations. Chairperson of EOC responded that EOC would provide various networking opportunities and organise workshops for members of its EO Club which consisted of mainly employers, companies and human resources managers. EOC would make use of that forum to promote understanding of the rights and responsibilities of employers and employees under RDO.

46. Mr LEUNG Kwok-hung enquired whether the promotional materials published by EOC were available in other languages. Chairperson of EOC said that promotional materials for the Sex Discrimination Ordinance, the Disability Discrimination Ordinance and the Family Status Discrimination Ordinance had been published in Chinese and English, the two official languages. With the impending implementation of RDO, EOC would consider which promotional materials should also be published in other languages. EOC had sought legal

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advice as to whether each and every single material published by EOC should be translated into languages other than Chinese and English, and the answer was negative. However, EOC would provide ethnic minorities with the relevant information to let them understand the work of EOC. Promotional leaflet would be translated into other languages on a need basis.

Legal assistance

47. Mr CHEUNG Man-kwong noted from paragraph 7.3.2 of the revised draft Code that in deciding whether to provide legal assistance in each application, EOC would take into account a wide range of factors including whether the case raised a question of principle, the complexity of the case, the strength of the evidence, and EOC's own strategic concerns and priorities. He expressed concern that the threshold for EOC to provide legal assistance to a person who wished to institute legal proceedings under anti-discrimination ordinances was higher than that applied in the merits test for legal aid. He pointed out that an aggrieved person had already gone through an unduly time-consuming process involving the lodging of a complaint, investigation of the case, and conciliation when he sought legal assistance from EOC. He questioned whether it was fair to the aggrieved person if he had satisfied all the other criteria but EOC still had to consider its own strategic concerns and priorities in deciding whether to grant him legal assistance.

48. Chairperson of EOC explained that the priorities referred to paragraph 7.3.2. of the revised draft Code was about EOC selecting cases which warranted more attention. EOC currently paid particular attention to applications involving accessibility to buildings and facilities for people with disabilities, sexual harassment, and family status discrimination in employment which were issues of public concern, although pregnancy discrimination and disability discrimination in employment constituted the majority of applications made to EOC. Chairperson of EOC said that the existing anti-discrimination ordinances enabled EOC to decide whether to provide legal assistance in each case as it thought fit. EOC was established not for the purpose of providing legal aid. It was not in a position to grant legal assistance for all meritorious cases. In addition, EOC did not have an action fund for litigation. At present, EOC's legal expenses in relation to giving legal assistance was \$1.5 million a year only. Given the above considerations, EOC had to take account of factors such as strategic concerns and priorities in granting legal assistance.

49. Mr CHEUNG Man-kwong said that \$1.5 million was inadequate for EOC to institute any legal proceedings. He urged EOC to request more funding from the Administration. He added that EOC should put in place a mechanism to refer meritorious cases to the Legal Aid Department (LAD).

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50. Chairperson of EOC clarified that EOC had not come across any case which had raised a question of principle and yet EOC had not instituted proceedings because of a lack of resources. The crux of the issue was that legal proceedings would be instituted only when warranted. Under the present arrangement, EOC would assist an aggrieved person to seek legal aid from LAD when needed.

51. Ms Emily LAU said that she expected that the HKSAR Government would report on the implementation of RDO during the United Nations hearing on the China report under the International Convention on the Elimination of All Forms of Racial Discrimination to be held in August 2009. The fact that EOC rarely instituted legal proceedings and its threshold for granting legal assistance was higher than that applied in the means test for legal aid might raise concerns. She enquired about the number of legal actions taken by EOC in the past few years.

52. Chairperson of EOC said that the number of applications for legal assistance and number of legal actions taken by EOC were set out in Annex I to EOC's paper (LC Paper No. CB(2)1093/08-09(01)). While some cases had attracted more public attention than the others, the number of legal actions taken by EOC was about the same in the past few years. EOC considered that by educating the public about racial equality, equal opportunities and harmony among persons of different racial groups would come by. Eliminating racial discrimination by such means was far more important and effective than taking legal actions. He informed members that in the United Kingdom, the former Disability Rights Commission supported 47 new legal cases in 2004-2005, whereas the former Commission for Racial Equality provided full legal representation in one case in 2004 and three cases in 2005. While he was not in a position to comment on the situation in the United Kingdom, he considered that the effectiveness of EOC in combating discrimination should not be measured by the number of legal actions taken.

53. Mr LEE Cheuk-yan said that he was given to understand that a staff member in the Correctional Services Department, who was from an ethnic minority, had been denied of promotion because he could not pass the Chinese proficiency written test. He considered the practice in breach of RDO and enquired whether EOC had examined the employment policy of the Government.

54. Chairperson of EOC responded that he could not comment on the individual case quoted by Mr LEE. However, an aggrieved person had the civil right to institute proceedings against an employer for racial discrimination or to lodge a complaint with EOC. EOC would investigate into the case when such a complaint was received. EOC would try to resolve the dispute by conciliation, failing which legal assistance might be offered.

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Funding

55. Ms Emily LAU expressed concern whether EOC had sufficient funding to cover legal expenses and promotional expenses to implement RDO and to publicise the Code. She considered it crucial for EOC to adopt a high-profile approach in order to make public aware of its work.

56. USCMA said that under the envelope funding approach, EOC's legal expenses in relation to giving legal assistance were absorbed in the Recurrent Account. From 2005-2006 up to the present, about \$1.5 million had been set aside each year for such purpose. If the amount was insufficient, EOC could resort to the General Reserve which stood at about \$17 million at present. In the past two years, several million of dollars had been allocated for EOC to prepare for the implementation of RDO. An addition of \$1.05 million had been earmarked for publicity work in 2009-2010. Should there be a lack of financial resources in any particular year, EOC could put forth a proposal for additional funding for the consideration of the Constitutional and Mainland Affairs Bureau.

57. Mr LEE Cheuk-yan considered the provision of \$1.05 million for publicity inadequate. He enquired about the additional resources provided to EOC for implementing RDO.

58. Chairperson of EOC said that EOC had spent several millions dollars a year on publicity and made the best endeavour to promote equal opportunities. As for the promotion work relating to RDO, \$600,000 out of the \$1.05 million had been earmarked to support the work of non-government organisations in this regard. EOC was given about \$6 million to prepare for the implementation of RDO and the amount had almost been used up. He was uncertain about the amount of provision given to EOC in the next fiscal year. Pending new provision from the Administration, EOC would resort to the General Reserve to hire the minimum manpower required to implement RDO in the short term and hoped that the Administration would provide EOC with the necessary funding in due course.

59. Mr LEE Cheuk-yan said that it appeared to him that the Administration had not made any financial commitment to EOC and the situation was far from ideal. He said that if the Administration was sincere about implementing RDO, it should discuss with EOC on the manpower requirement and provide EOC with the necessary resources for the implementation of RDO on a permanent basis.

60. The meeting ended at 5:26 pm.