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by the Administration)

Panel on Constitutional Affairs

Minutes of meeting
held on Monday, 18 January 2010, 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 LI Fung-ying, BBS, 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 Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung
Hon CHEUNG Hok-ming, GBS, JP
Hon WONG Ting-kwong, BBS, JP
Hon Ronny TONG Ka-wah, SC
Hon CHIM Pui-chung
Hon Cyd HO Sau-lan
Dr Hon LAM Tai-fai, BBS, JP
Hon CHAN Kin-por, JP
Dr Hon Priscilla LEUNG Mei-fun
Hon CHEUNG Kwok-che
Hon WONG Kwok-kin, BBS
Hon IP Kwok-him, GBS, JP
Hon Mrs Regina IP LAU Suk-ye, GBS, JP

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

**Members
absent** : Prof Hon Patrick LAU Sau-shing, SBS, JP
Hon Tanya CHAN
Hon WONG Yuk-man

**Public Officers
attending** : Item III

Mr Stephen LAM Sui-lung
Secretary for Constitutional and Mainland Affairs

Miss Adeline WONG Ching-man
Under Secretary for Constitutional and Mainland Affairs

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

Ms Christina CHONG Yau-ling
Principal Assistant Secretary for Constitutional and Mainland
Affairs

Mr Benjamin YUNG Po-shu
Principal Education Officer (Curriculum Development)
Education Bureau

Ms Margaret TAY
Chief Manager (Integrated Care Programs)
Hospital Authority

Item IV

Miss Adeline WONG Ching-man
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

Ms Roxana CHENG Pui-lan
Senior Assistant Solicitor General
Department of Justice

Ms IP Ling-bik
Principal Assistant Secretary (Education Commission & Planning)
Education Bureau

Miss Gloria LO Kit-wai
Principal Assistant Secretary for Food and Health (Health)
Food and Health Bureau

Mrs Polly CHAN CHOY Bo-chun
Principal Assistant Secretary for Labour and Welfare (Welfare)
Labour and Welfare Bureau

Miss Drew LAI Sai-ming
Senior Administrative Officer (Policy Support)
Labour Department

Mr LO Ying-ki, Alan
Principal Assistant Secretary (Security)
Security Bureau

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 the following papers had been issued since the last meeting -

- (a) letter dated 18 November 2009 from Hong Kong Women's Coalition on Equal Opportunities ("HKWCEO") to the Administration expressing concern about the appointment process for the Chairperson of the Equal Opportunities Commission ("EOC") [LC Paper No. CB(2)595/09-10(01)];

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- (b) Administration's response to HKWCEO dated 18 December 2009 [LC Paper No. CB(2)595/09-10(02)]; and
- (c) press release provided by the Administration on the appointment of the new Chairperson of EOC [LC Paper No. CB(2)750/09-10(01)].

II. Items for discussion at the next meeting

[LC Paper Nos. CB(2)727/09-10(01) to (02)]

2. The Chairman referred to agenda item IV below and informed members that the Panel had agreed at the last meeting to receive views from the public on the outline of topics to be included in the third report of the Hong Kong Special Administrative Region ("HKSAR") under the International Covenant on Economic, Social and Cultural Rights ("ICESCR") at the next meeting to be held on 10 February 2010.

3. Members also agreed to discuss the following items proposed by the Secretary for Constitutional and Mainland Affairs ("SCMA") at the next meeting -

- (a) support service centres for ethnic minorities; and
- (b) meeting with the Chairperson of EOC or the Privacy Commissioner for Personal Data.

On the item referred to in paragraph 3(b) above, SCMA said that the Administration understood the wish of the Panel to meet with the Chairperson of EOC and the Privacy Commissioner on their work. The Administration would liaise with the two bodies and revert to the Panel on the suitable time for arranging the meeting.

(Post-meeting note: The Panel received briefings from the Chairperson of EOC and the Privacy Commissioner at the meetings on 10 February and 19 March 2010 respectively.)

III. Promotion of equal opportunities on grounds of sexual orientation and gender identity

[LC Paper Nos. CB(2)727/09-10(03) to (04) and CB(2)1544/08-09(01)]

4. SCMA briefed members on the measures taken by the Administration to promote equal opportunities in relation to sexual orientation and gender identity and related issues as set out in the Administration's paper [LC Paper No. CB(2)727/09-10(03)].

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5. Members noted the following papers on the subject under discussion -
 - (a) background brief prepared by the Legislative Council ("LegCo") Secretariat [LC Paper No. CB(2)727/09-10(04)]; and
 - (b) referral from the Complaints Division of the LegCo Secretariat on discrimination issues relating to sexual orientation and gender identity [LC Paper No. CB(2)1544/08-09(01)].

Public education, promotion and publicity

6. Ms Emily LAU said that while the Administration had given an account of the work done in the areas of public education, promotion, training and employment in order to tackle the problem of discrimination on the ground of sexual orientation and gender identity, it had not addressed the problem of how to deal with the objection of religious groups about measures to safeguard the rights of people with different sexual orientation in its paper. In addition, the Hong Kong school curriculum did not include teaching topics on sexual orientation.

7. SCMA responded that government bureaux and departments, including the Education Bureau ("EDB"), the Social Welfare Department ("SWD"), the Department of Health ("DH") and the Hospital Authority ("HA"), were committed to promoting equal opportunities for all, including people of different sexual orientation and transgendered persons. Through public education and publicity, the Administration had promoted non-discrimination and aimed to nurture a culture of greater objectivity, tolerance and mutual respect in the community. Having regard to the sensitive nature of sex education and the concerns of parents, EDB had incorporated elements on promotion of equal opportunities for everybody, including people of different sexual orientation, in school curricula. Principal Education Officer (Curriculum Development) of EDB ("EDO") supplemented that the cultivation for respect for others was a core value, which was being promoted under the current curriculum, would be conducive to achieving the aim for eliminating discrimination of any nature. School curricula would also be reviewed and updated from time to time taking into account social development and views received from the public.

8. SCMA further said that the issue of sexual orientation was controversial. The Administration's paper had not addressed the relevant religious and moral issues because it sought to address the issues raised by the Subcommittee to study discrimination on the ground of sexual orientation formed under the Panel on Home Affairs in December 2000 ("the Subcommittee"). Nevertheless, organisations with different background, including religious background, attended the Sexual Minorities Forum at which issues relating to sexual orientation were discussed.

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9. Dr Priscilla LEUNG said that apart from religious groups, parents were also concerned about public education on sexual orientation. She cautioned that the subject of sexual orientation should not be included in the junior secondary school curriculum because junior secondary students had yet to establish values for their life at that age. As they were not mature enough to understand the perplexities of sexual orientation, some students might be induced to try out non-heterosexuality out of curiosity. Dr LEUNG expressed grave concern about the possible impact on young people and on the traditional values of family and marriage if non-heterosexual behaviour was promoted and encouraged. As homosexuals were not necessarily inborn, educational effort in relation to sexual orientation should only be made in a low key manner. She considered that education on sexual orientation should not be introduced to students below the age of 18.

10. SCMA responded that the Administration was aware that religious groups, parents, media and the public were concerned about the sensitivity of the subject. The aim of the Administration was to promote equal opportunities for all. EDO supplemented that the subject of "Life and Society" to be offered in the junior secondary curriculum in 2012 sought to encourage students to appreciate multiple values and learn how to maintain harmonious relationships with others.

11. Ms Audrey EU said that the Administration should educate the public on sexual orientation from the medical angle rather than purely from the religious and moral angles. Overseas medical research had already revealed that homosexuality was genetic, inborn, physiological and natural. She considered that such findings should be used for educating the public, and educating the public about homosexuality would not encourage a heterosexual to become a homosexual.

12. SCMA responded that while the medical profession perceived that homosexuality by itself was not a medical disorder, it had not concluded that sexual orientation was determined by genetic factor only. It was noted that some persons were born with homosexual inclination, whereas some other persons had developed or changed their sexual orientation at a later stage of their life.

13. Dr PAN Pey-chyou advised members that the medical profession had carried out in-depth studies on homosexuality and come to the view that homosexuals could be genetic or otherwise. The medical profession perceived that homosexuality was neither a medical nor mental disorder and homosexuals could be subjected to depression like any other individuals. In response to Dr PAN's concern about measures to reduce the risk of homosexuals contracting AIDS, SCMA said that DH had been promoting safe sex to the public all along, including homosexuals. He would relay Dr PAN's concern to DH.

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14. Referring to paragraph 15 of the Final Report of the Subcommittee [Appendix I to LC Paper No. CB(2)727/09-10(04)], Ms Cyd HO said that HA had given the view that homosexuality by itself was not a medical disorder and therefore did not require medical treatment. The reason for some homosexuals seeking medical treatment or counselling was because they were disturbed by their sexual orientation, or were emotionally upset by the discriminatory treatment they received. Ms HO expressed concern whether the Administration had allocated sufficient resources to non-government organisations ("NGOs") which helped parents counsel their children over problems relating to their sexual orientation. She also expressed concern whether the religious belief of a Principal Official would affect his/her decision in allocating funds to NGOs.

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15. SCMA assured members that Principal Officials would formulate and implement human rights policies in compliance with the spirit of the Basic Law irrespective of their religious beliefs. Social workers in SWD would provide counselling to a family if it needed such a service. SCMA would relay Ms HO's concern about resources to SWD.

16. Mr Jeffrey LAM said that given that Hong Kong was an international city with people coming from different races, religions and cultures who upheld different moral standards and values, the subject of sexual orientation was bound to be controversial. In addition, one could not rule out the possibilities of some minorities making false claims that they were not promoted to a higher position on the ground of their sexual orientation when in fact their ability in work was in question. Mr LAM enquired about the work undertaken by the Administration to eliminate discrimination on the ground of sexual orientation in the areas of employment, education and training.

17. SCMA responded that employers were encouraged to follow the practices set out in the Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation ("the Code") to ensure equal opportunities in employment. Discussion sessions were held with employers, companies and associations of human resources managers to promote understanding of the responsibilities of employers to ensure equal opportunities in employment. On social workers' training, SWD and NGOs provided in-service training to social workers to enhance their counselling skills towards people with a different sexual orientation.

18. On education, Deputy Secretary for Constitutional and Mainland Affairs ("DSCMA") and EDO said that the Administration had contacted different bodies to promote elimination of discrimination and collected public views on the issue. It had also developed programmes for school heads, teachers and students to ensure that students were taught on correct values and attitudes towards schoolmates with a different sexual orientation. The Hong Kong school curriculum had been revised and updated to provide opportunities for students to

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develop concepts and values in relation to non-discrimination, equal opportunities, respect for others and harmonious relationships. Chief Manager (Integrated Care Programme) of HA said that in order to reinforce healthcare staff's awareness in providing patient-centred care, irrespective of patients' sexual orientation, HA had been organising training programmes on a continuous basis to enhance staff's communication skills and their awareness in respecting patients' rights and feelings. In 2009, over 2 000 healthcare workers, including some 200 medical practitioners, had attended these training programmes.

19. Ms Emily LAU, however, considered that the education and promotion programmes carried out by the Administration was too generic and could not eliminate effectively discrimination on the ground of sexual orientation.

20. Mrs Sophie LEUNG cautioned that the subject under discussion should be dealt with from the angle of eliminating discrimination on the ground of sexual orientation and not promoting the understanding of sexual orientation. She said that school curriculum should bear the same theme to alleviate parents' concern that the education work might indirectly introduce young people to homosexuality.

21. Mr IP Kwok-him said that while the society at large upheld the traditional family values and moral standards and did not accept homosexuality, there was no question that the rights of sexual minorities should be protected. He enquired how the Administration could ensure that its publicity programme would educate effectively the public on non-discrimination against people of a different sexual orientation while not promoting homosexuality.

22. SCMA said that people were equal before the law, irrespective of their sexual orientation. The Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383) ("HKBORO") protected every citizen against any form of discrimination, including sexual orientation. The Administration was committed to promoting equal opportunities for all and it did not seek to promote homosexual behaviour. The Administration had implemented administrative measures in the fields of employment, education, and the provision of services or goods to eliminate such discrimination.

Employment

23. Mr Albert HO said that a person's sexual preference was a private matter about which an employer should not have the right to know. He enquired whether a civil servant would be asked to indicate his/her sexual orientation during a promotion board interview and whether it would be a factor of consideration in the integrity check.

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24. SCMA said that the employment matters within the Government would be handled in accordance with the Code. To his understanding, promotion in the civil service was usually conducted in the form of paper board under which candidates would not be required to go through an interview. Candidates applying for promotion in the disciplinary services, however, would need to attend interviews under which problem-solving questions would be raised to assess their competence in taking up higher responsibility. For promotion to a more senior position or sensitive rank, all types of questions would be posed to the candidate concerned including his family background, his/her private life and investment, etc. Individual candidates had the discretion to answer or not to answer the questions posed. The promotion board would assess the suitability and ability of candidates in a professional and pragmatic manner.

25. Mr Albert HO was of the view that people with a different sexual orientation would have the best protection in employment if an employer did not have the right to enquire into the sexual preference of the employees.

Gender Identity and Sexual Orientation Unit ("GISOU")

26. Mr Paul TSE said that the Administration's paper indicated that little progress had been made to combat the problem of sexual orientation discrimination. He enquired about the parties responsible for the implementation and enforcement of policies relating to discrimination on the ground of sexual orientation.

27. SCMA responded that the Administration had since 1998 provided financial assistance for NGOs to carry out activities to promote equal opportunities on the ground of sexual orientation. At present, GISOU was responsible for, among others, managing and monitoring the Equal Opportunities (Sexual Orientation) Funding Scheme, launching publicity and education programmes, and maintaining a hotline for enquiries and complaints on issues relating to sexual orientation and gender identity. The complaints received by GISOU indicated that the problem was not serious in terms of nature and quantity. SCMA added that apart from the Constitutional and Mainland Affairs Bureau, EOC also received complaints in relation to discrimination on the ground of sexual orientation.

28. Mr Paul TSE enquired about the manpower and funding provided to GISOU. SCMA responded that GISOU was manned by two full-time staff with a funding of \$1.5 million to run the office and promotional activities to educate the public on equal opportunities for people of different sexual orientation.

29. In response to Mr IP Kwok-him, SCMA said that GISOU had received a total of 33 complaints between July 2005 and December 2009. Mr IP further enquired about the breakdown of the 33 complaints by category. Ms Audrey EU also asked how the Administration handled these complaints.

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30. SCMA responded that a person who had experienced discrimination against his/her sexual orientation could lodge a complaint with GISOU which would carefully study the case. The personal data collected in the course of handling the complaint would be kept confidential. Where appropriate, the person or organisation against whom the complaint was lodged would be given the opportunity to explain his/its stance. GISOU would give a full assessment of each case and inform the complainant about the outcome of the investigation. SCMA further provided a breakdown by the nature of complaints as follows -

- (a) four related to provision of goods/facilities/services;
- (b) two related to recruitment/employment ;
- (c) five related to offensive behaviours (or speech);
- (d) two related to media regarding content that debased people of different sexual orientation or transgendered persons;
- (e) 19 related to the decision of the Broadcasting Authority on a television programme on homosexuality run by Radio Television Hong Kong; and
- (f) one related to other nature.

Regarding the complaints against the decision of the Broadcasting Authority referred to in paragraph 30(e) above, SCMA said that in a judicial review filed by a member of the public against the decision on the television programme, the Court had overturned that decision.

Legislation against discrimination on the ground of sexual orientation

31. Ms Cyd HO said that the complaints received by GISOU did not reflect severity of the problem as NGOs had received far more complaints, which should be referred to GISOU for detailed study. Ms HO said that these cases reflected that the Administration should enhance its policies to eliminate discrimination on the ground of sexual orientation. She quoted the examples that the existing policies had deprived the rights of homosexual couples to reunite with their families, to apply for public housing, and to enjoy tax concession. As the Administration's policies would have the effect of depriving homosexuals those rights, she urged the Administration to review its public policies with a view to addressing the needs of homosexual couples, and to introduce legislation to outlaw discrimination on the ground of sexual orientation.

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32. SCMA responded that relevant government departments would act in accordance with existing law and policies in approving applications for family reunion, public housing, tax concessions, etc. Since a homosexual couple could not get married in accordance with the existing Marriage Ordinance (Cap. 181), they would not be able to produce a marriage certificate to prove their marital relationship to be eligible for the services mentioned above. SCMA added that any proposal to amend the Marriage Ordinance with a view to issuing a marriage certificate to a homosexual couple would give rise to moral controversies in the community. According to the findings of the survey conducted in October 2005, views in the community on the need for introducing legislation to prohibit discrimination against people on the ground of sexual orientation were diverse. While 34.5% of the respondents considered that the Government should not legislate against discrimination on the ground of sexual orientation at that stage, 28.7% thought otherwise and 33.7% of the respondents stood neutral. The Administration's view was that it was not the appropriate time to consider the question of introducing legislation.

33. Ms Emily LAU and Mr Albert HO were of view that it was inappropriate to determine on the basis of majority views the need to legislation for the protection of the sexual preference of the minorities. Mr HO recalled that the Administration had used the same argument to turn down the proposal to legislate against race discrimination. The relevant United Nations ("UN") human rights committees had already rebutted the argument. Mr HO said that there was an international standard to protect the rights of minorities. In his view, legislation might well be an educational tool to cultivate in the community a proper attitude towards sexual minorities. As to the extent of the protection to be provided in the legislation, it was a matter to be studied.

34. SCMA responded that Hong Kong people had all along maintained a harmonious relationship with people of different races and there were policies to encourage ethnic minorities to integrate into Hong Kong's society before the introduction of the Race Discrimination Ordinance (Cap. 602). The subject of sexual orientation, however, was far more controversial. On the one hand, the proposal to legislate against discrimination on the ground of sexual orientation would be seen by opposing organisations and religious groups as a measure to encourage homosexual and non-heterosexual behaviour. On the other hand, sexual minorities would perceive legislation as a green light to homosexual marriages.

35. Mr Albert HO said that while the recognition of homosexual marriages was controversial, some of the practices set out in the Code were not. He said that the Administration should consider legislating against discrimination on the ground of sexual orientation in relevant areas as an initial step.

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36. Mr Paul TSE concurred with Mr Albert HO. He said that the Administration should provide a legal framework to outlaw discrimination on the ground of sexual orientation so that EOC would be empowered to handle relevant discrimination issues. Mr TSE enquired about the conditions under which the time would be considered right to legislate against discrimination on the ground of sexual orientation.

37. SCMA responded that overseas experience in legislating controversial issues indicated that people's views would change and develop over time and when consensus on the general direction could be reached, the question as whether relevant legislation should be introduced could be further considered. Before the making of such legislation, human rights and equal opportunities for sexual minorities would be protected under the Basic Law and HKBORO.

38. Dr Philip WONG held the view that legislation was not the only means to resolve discrimination on the ground of sexual orientation. He considered administrative measures and public education equally effective in combating discriminatory acts in this regard. He further pointed out that the act of classifying a group of people as sexual minorities could be viewed as discriminatory by itself and the concept might not be welcomed by the community.

39. Ms Cyd HO said that given that local legislation such as the Immigration Ordinance (Cap. 115) and the Housing Ordinance (Cap. 283) was discriminatory against sexual minorities, the Administration had the responsibility to take actions to protect the rights of sexual minorities and to promote equal opportunities for all.

40. SCMA noted the position of Ms HO on legislating against discrimination on the ground of sexual orientation. Given the controversial nature of the issue, the practical way was to implement administrative measures in the areas of education, training and employment. The Administration would pay attention to social development and enhance administrative measures to eliminate discrimination on the ground of sexual orientation in the community.

Proposal to form a subcommittee under the Panel

41. Ms Emily LAU suggested that a subcommittee should be formed under the Panel to follow up on issues relating to discrimination on the ground of sexual orientation.

42. The Chairman advised that according to Rule 77(9) of the Rules of Procedure of LegCo, a Panel might, if it considered appropriate, appoint subcommittees to study specific issues and to report to the Panel. House rule 22(u)(ii) provided that a proposal to appoint such subcommittees should contain sufficient information on the proposed terms of reference, time frame, work plan and extent of work involved in the study of the specific issue or project

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to facilitate consideration by the Panel concerned. He invited members' views on Ms Emily LAU's proposal.

43. Ms Emily LAU and Ms Cyd HO expressed support for the formation of a subcommittee under the Panel. Ms LAU said that given that the issue in question was controversial and members had yet to study in detail the information provided in the Administration's paper, a subcommittee was necessary. Ms HO said that through discussions held by the subcommittee, the media and the public would acquire a better understanding of the issue. In addition, the subcommittee by examining individual complaint cases could identify problem areas, study whether these problems should be resolved by legislative or administrative means, and ascertain whether additional resources were needed to ensure implementation of equal opportunities and equal treatment to people of different sexual orientation.

44. Mr Paul TSE enquired whether subcommittees had been formed to study issues relating to discrimination on grounds of sex, disability and race before the respective legislative proposals were introduced into LegCo. Ms Miriam LAU recalled that Members had been given the opportunities to express their views on those areas during motion debates in the Council or discussions by relevant Panels. While she supported equal opportunities for all, including people of a different sexual orientation, the proposal to legislate against discrimination on the ground of sexual orientation was too controversial. The formation of a subcommittee with a view to pressing the Administration to introduce such legislation might give rise to more disputes. She considered it more appropriate for the Panel to follow up on the issue and did not support the formation of such a subcommittee.

45. Mr IP Kwok-him did not agree with Ms Emily LAU's proposal, pointing out that while the legislation to outlaw discrimination on the ground of sexual orientation, if enacted, would help protect the interests of people of a different sexual orientation, it would also impose sanctions against other groups of people. He considered that the rights of sexual minorities could be protected by administrative measures and there was no pressing need to form a dedicated committee to study the issue at this stage. Mr IP also queried whether the formation of such a subcommittee would achieve any concrete effect.

46. Some other members including Mr Jeffrey LAM, Dr PAN Pey-chyou, Mr Abraham SHEK, and Dr Philip WONG also expressed disagreement with the proposal of forming a subcommittee. Mr Jeffrey LAM considered it inappropriate to set up the subcommittee at this stage. Given that the issue was controversial, frequent discussions might give rise to heated debates among different groups in the community which would not be conducive to establishing harmonious relationship in the community. Dr PAN and Mr SHEK considered that the Panel was the appropriate forum to monitor the work of the Government in this regard.

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47. To conclude the discussion, the Chairman said that as the majority of Panel members did not support the proposal, the Panel would not form a subcommittee to follow up on issues relating to discrimination on the ground of sexual orientation. Members raised no objection. The Chairman requested the Administration to report progress on the relevant issues to the Panel in due course. Ms Emily LAU suggested that the Administration would revert to the Panel by the end of the current session. SCMA said that he would consult the relevant bureaux and departments on the timing to make further report to the Panel.

IV. An outline of the topics in the third report of the Hong Kong Special Administrative Region under the International Covenant on Economic, Social and Cultural Rights

[LC Paper Nos. CB(2)727/09-10(05) to (06)]

48. Under Secretary for Constitutional and Mainland Affairs ("USCMA") briefed members on the proposed outline of the topics to be included in the third report of the HKSAR under ICESCR ("the third HKSAR report") as set out in the Administration's paper [LC Paper No. CB(2)727/09-10(05)]. Members noted that the second HKSAR report was submitted to the UN Committee on Economic, Social and Cultural Rights ("the UN Committee") in June 2003. The Concluding Observations of the UN Committee issued in May 2005 ("Concluding Observations") were set out in Annex to the Administration's paper.

49. Members also noted the background brief prepared by the LegCo Secretariat [LC Paper No. CB(2)727/09-10(06)] on the subject under discussion.

Application of ICESCR to Hong Kong

50. Mr LEUNG Kwok-hung said that according to Article 39 of the Basic Law, the provisions of the International Covenant on Civil and Political Rights ("ICCPR"), ICESCR and international labour conventions as applied to Hong Kong should remain in force and should be implemented through the laws of HKSAR. He expressed concern that the Administration had not enacted domestic legislation to entrench ICESCR.

51. USCMA assured members that the Administration attached great importance to implementing ICESCR. Senior Assistant Solicitor General of the Department of Justice ("SASG") explained that although HKSAR had not specifically enacted a single piece of legislation to implement ICESCR, as in the case of ICCPR, incorporating the provisions of ICESCR into the laws of Hong Kong, the rights enshrined in ICESCR were protected by the Basic Law, and other domestic laws, such as the Education Ordinance (Cap. 279) and the Employment Ordinance (Cap. 57) ("EO").

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52. Mr LEUNG Kwok-hung said that HKBORO was not embracive as it did not include all the provisions of ICESCR such as those relating to collective bargaining. He enquired about the specific provisions of ICESCR as applied and not applied to Hong Kong.

53. DSCMA explained that following China's ratification of ICESCR in March 2001, the Government of the People's Republic of China ("PRC") had notified the UN Secretary-General of the following statement on the application of ICESCR to HKSAR -

- (a) Article 6 of ICESCR did not preclude the formulation of regulations by HKSAR for employment restrictions, based on place of birth or residence qualifications, for the purpose of safeguarding the employment opportunities of local workers in HKSAR; and
- (b) "National federations or confederations" in Article 8.1(b) of ICESCR shall be interpreted, in this case, as "federation or confederations in HKSAR" and this Article did not imply the right of trade union federations or confederations to form or join political organisations or bodies established outside HKSAR.

DSCMA said that except for the above reservations, all provisions of ICESCR applied to Hong Kong, and had been implemented through various legislative and administrative measures.

54. SASG supplemented that Article 2(1) of ICESCR provided that -

"Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

SASG said that the wording of the Article clearly indicated that ICESCR did not impose an obligation for immediate enforcement but allowed States Parties to take steps progressively to achieve the rights guaranteed therein. There was also no obligation under ICESCR to implement it by legislation alone.

55. Mrs Sophie LEUNG said that as Article 2(1) of ICESCR did not require the implementation of the rights guaranteed in the Covenant in one go, the Administration should enact law only when needed, taking into account public aspirations and the local circumstances.

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Article 7 : Right to enjoy just and favourable conditions of work

56. Mr Ronny TONG said that Article 7(a) of ICESCR provided that -

"The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
 - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;"

Mr TONG expressed concern that the Minimum Wage Bill ("the Bill") in its present form was inconsistent with Article 7(a)(ii) of ICESCR, in that the Bill sought to provide for a minimum wage without fulfilling the standard of a decent living, and the exemption of live-in domestic workers from the Bill had breached Article 7(a)(i). He asked how the Administration would explain the inconsistencies to the UN Committee.

57. Senior Administrative Officer (Policy Support) of the Labour Department ("SAOLD") explained that the Bill sought to introduce a statutory minimum wage regime which would provide a wage floor expressed as an hourly rate to forestall excessively low wages. From a legal perspective, exemption of live-in domestic workers from the Bill was legally tenable as there was a justifiable difference, mainly involving different working patterns and provision of in-kind benefits arising from dwelling in the households of their employers free of charge, between live-in domestic workers and other workers who would qualify for the statutory minimum wage. The Administration would explain in the third HKSAR report the policy objective of the Bill.

58. SASG supplemented that, as specified in its Article 2, ICESCR was progressive in nature, viz. requiring States Parties to take steps, to the maximum of their available resources, to achieve progressively the full realisation of the rights in ICESCR by all appropriate means. In view of Article 2, the Bill represented a major step taken by the HKSAR Government to achieve progressively the rights stipulated in Article 7, and thus the Bill was in conformity with ICESCR. In further response to Mr TONG, the Administration undertook to provide information on the conformity of the Bill with Article 7 of ICESCR.

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(*Post-meeting note: The Administration's response was issued to members vide LC Paper No. CB(2)894/09-10 on 4 February 2010.*)

59. Referring to the outline in paragraph 16 of the Administration's paper, Dr PAN Pey-chyou enquired why the subject of "Prevention of accidents and diseases in the workplace: legal protections" would be included in the third HKSAR report when the Administration had not made any progress in this regard. For example, many workers were not diagnosed with occupational diseases after seeking consultation in the Occupational Health Clinics of the Labour Department and hence could not receive any compensation although their injuries were caused by work.

60. SAOLD explained that the third HKSAR report would include, among others, updates of significant developments since the submission of the HKSAR's second report in 2003, while it would state so if the situation remained essentially the same since the last report. SAOLD further said that the Administration did make a number of improvements in respect of occupational diseases, including the introduction of an amendment bill to improve the compensation scheme for persons with occupational deafness. In addition, mesothelioma had become a compensable disease under the Pneumoconiosis and Mesothelioma (Compensation) Ordinance (Cap. 360) in 2008, alongside pneumoconiosis.

61. Mrs Sophie LEUNG said that the third HKSAR report should provide statistics on occupational diseases rather than the levels of compensation to indicate whether improvement had been made to prevent occupational diseases. SAOLD noted her view.

Article 8 : Right to trade union membership

62. Ms LI Fung-ying said that the Administration should strive to compile the third HKSAR report with foresight, instead of simply setting out existing measures implemented by the HKSAR Government to improve labour relations. She enquired whether the Administration would include in the third HKSAR report issues not yet handled, for instance, legislative measures to ensure reinstatement or re-engagement of an employee who had been dismissed unreasonably and unlawfully.

63. SAOLD said that provisions concerning the reinstatement or re-engagement of an employee who had been dismissed unreasonably and unlawfully were in place under the existing EO. While the Administration would introduce a bill to improve the provisions, including requiring the employer to pay a further sum to the employee for failing to comply with a reinstatement or re-engagement order issued for that purpose in due course, the Administration would report faithfully the latest progress in the third HKSAR report.

Action

64. Ms LI Fung-ying and Mr LEUNG Kwok-hung expressed concern that the Administration had not introduced a bill on collective bargaining despite the trade unions' repeated requests. Ms LI enquired whether the Administration would reflect the situation in the third HKSAR report. Mr LEUNG expressed dissatisfaction that the HKSAR Government had repealed the Employee's Right to Representation, Consultation and Collective Bargaining Ordinance in 1997. Given that this was a retrograde step for labour rights, he enquired about the progressive step to be taken by the Administration in the near future.

65. SAOLD said that the Administration had explained in the first HKSAR report that imposing collective bargaining by statute would have long-term implications on Hong Kong's labour relations system and could affect adversely Hong Kong's economic competitiveness. Given the predominance of small and medium enterprises which accounted for 98% of the companies in Hong Kong, the Government considered such law inappropriate for Hong Kong. Although the Administration did not intend to introduce a bill on collective bargaining, it had adopted a multi-pronged approach in promoting labour relations. The measures taken included providing voluntary conciliation, promoting good people management practices and strengthening tripartite collaboration at the industry level. The Administration would cover in the third HKSAR report progress made by the Administration since its last report, the aspiration of trade unions and how the Administration implemented measures to facilitate effective communication between employers and employees at the enterprise level.

Article 11: Right to an adequate standard of living

66. Ms Emily LAU expressed concern about the increasing number of people living in poverty and the wide income disparity among individuals. She enquired whether the problem would be reflected in the third HKSAR report and the body responsible for following up the problem since the Commission on Poverty ceased operation on 30 June 2007.

Admin

67. Principal Assistant Secretary for Labour and Welfare ("PASLW") said that the Labour and Welfare Bureau would set out in the third HKSAR report its policies and existing measures on alleviation of poverty, taking into account the views to be received during public consultation on the outline of topics in the report.

68. Mr LEE Wing-tat found it unacceptable that a society as affluent as Hong Kong had citizens still living in caged homes. Unlike the Administration's claim that the waiting time for public housing was three years, some middle-aged singletons had waited for 10 years.

Action

69. Referring to paragraphs 86 and 98 of the Concluding Observations, Mr IP Kwok-him expressed concern about poverty among the disadvantaged and marginalised groups and older persons. He considered that the right to an adequate standard of living had not been adequately addressed as many people still lived in caged homes. He enquired how the Administration would reflect the situation in the third HKSAR report.

Admin

70. USCMA said that she would relay Mr LEE and Mr IP's concerns to the relevant bureaux and departments and revert to members at the next meeting.

Youth issues

71. Referring to the recent incidents where a group of young people born after 1980 ("the post-80s generation") staging a series of protests against the construction of railway works for the Hong Kong Section of Guangzhou-Shenzhen-Hong Kong Express Rail Link ("the Express Rail Link"), Ms Emily LAU said that the post-80s generation was discontented with the present political, social and economic environment which provided limited opportunities for advancement. Ms LAU said that issues relating to youth straddled over a number of policy areas, including employment, education, family relations, etc. and enquired how the Administration would reflect this problem in the third HKSAR report.

72. USCMA responded that the Administration was aware of the need to enhance communication with young people, listen to their voices and understand their aspirations, visions and expectations towards society. The Administration was reflecting on how to enhance engagement with the younger generations. On the relations between young people and their families, the Family Council under the Home Affairs Bureau ("HAB") had organised a Happy Family Campaign to promote family core values which was conducive to building a harmonious community. Ms Emily LAU, however, expressed doubt whether it would be effective to entrust the Family Council to deal with issues relating to young people. USCMA clarified that her reference to the work of the Family Council was in response to Ms LAU's comments on family relations and she was not suggesting that the Family Council had been entrusted to deal with all issues relating to young people. The Commission on Youth ("COY"), for one, was responsible.

73. Mr LI Wing-tat enquired about the total amount of money spent on the work for young people by relevant bureaux and departments. He expressed concern that COY, with the majority of members over 50 years old, might not be able to understand the needs of young people and in turn provide useful advice to the Government on matters relating to youth development. He suggested that COY should consist of younger members and, if not, consideration should be given to allowing them to participate in working groups under COY. Mr LEE said that the Government should listen to different voices and be accommodating.

Action

He noted that the Youth Forum, which was under the purview of HAB, had ceased functioning because the views of some young radicals were not welcomed by the Administration. He said that representatives of HAB should be invited to attend the next Panel meeting to explain its position. Mr LEUNG Kwok-hung concurred with Mr LEE.

Admin 74. On the resources spent on youth, USCMA said that as youth policy straddled over a number of bureaux and government departments, it would be difficult to come up with an exact figure. She would also relay Mr LEE's concerns relating to COY and Youth Forum to HAB.

Admin 75. Dr Priscilla LEUNG said that youths staging protests against the Express Rail Link came from all walks of life. It was obvious that they were frustrated over diminishing opportunities for advancement in the society. The Administration should tackle that problem and review its existing mechanism with a view to improving communication. She held the view that the membership of COY should consist of representatives from youth and parental groups. USCMA responded that she would relay Dr LEUNG's views to HAB.

76. Mrs Sophie LEUNG said that the Administration should adopt a holistic approach in formulating policies for youth development, so that the interests of young people would be addressed and opportunities would be provided to broaden their horizon. DSCMA responded that the Administration dealt with youth policy having regard to relevant perspectives. The Administration would give full consideration to the views received in drafting the third HKSAR report.

Economic rights

77. Mr WONG Yung-kan expressed concern that the outline was silent on the economic rights of the agriculture and fishery industry. He said that unlike PRC, the HKSAR Government attached little importance to this industry. Although the contribution of the industry in terms of gross domestic product was small, the Administration should implement measures to ensure its healthy development.

78. DSCMA explained that ICESCR sought to safeguard the rights of all people recognised therein, irrespective of the industries to which they belonged. To this end, the Administration would not include in or exclude from the third HKSAR report the economic activities of any particular industries. However, if the agriculture and fishery industry proposed measures that would affect the economic, social and cultural rights of a person, for example, new conservation policies, the Administration would welcome these views and consider reflecting them in the third HKSAR report.

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Consultation

79. Ms LI Fung-ying enquired whether the Administration would provide a copy of the draft HKSAR report for further consultation with the Panel before its submission to the UN in June 2010. USCMA responded that according to the established practice, there would not be another round of consultation before the submission of the report to UN.

80. The meeting ended at 5:30 pm.

Council Business Division 2
Legislative Council Secretariat
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