

立法會 *Legislative Council*

LC Paper No. CB(2)1324/12-13(06)

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Panel on Constitutional Affairs

Background brief prepared by the Legislative Council Secretariat for the meeting on 17 June 2013

Briefing by the former Chairperson of the Equal Opportunities Commission ("EOC") on the work of EOC

Purpose

This paper gives a brief account of the major issues raised by members when the former Chairperson of EOC briefed the Panel on Constitutional Affairs ("the Panel") on the work of EOC.

Background

2. Established under the Sex Discrimination Ordinance ("SDO") (Cap. 480) on 20 May 1996, EOC is a statutory body responsible for the implementation of SDO, the Disability Discrimination Ordinance ("DDO") (Cap. 487), the Family Status Discrimination Ordinance ("FSDO") (Cap. 527) and the Race Discrimination Ordinance ("RDO") (Cap. 602). EOC comprises the Chairperson and up to 16 members. The authority of appointment of the Chairperson and members rests with the Chief Executive who shall determine the remuneration and the terms and conditions of appointment of the Chairperson. Under section 63 of SDO, the Chairperson shall be appointed on a full-time basis whereas other members of EOC may be appointed on a full-time or part-time basis.

3. The post of the Chairperson of EOC, which has the executive responsibility for the overall operation and management of EOC, is pitched at the rank equivalent to Point 8 on the Directorate Pay Scale of the Civil Service. EOC used to have a post of Chief Executive Officer ("CEO") which was pitched at the rank equivalent to Point 3 of the Directorate Pay Scale, but the CEO post was deleted in July 2000. The responsibility of the CEO post was then shared between the Chairperson and the Director (Planning and Administration) of EOC.

4. In Chapter 3 of Report No. 52 of the Director of Audit tabled at the Legislative Council ("LegCo") on 22 April 2009, Audit has recommended that the Secretary for Constitutional and Mainland Affairs ("SCMA") should expedite action to take forward the proposal of separation of the posts of the Chairperson and CEO of EOC which was recommended both in the report of the Independent Panel of Inquiry on the Incidents Relating to EOC as well as the reports of two internal reviews conducted by EOC. The Administration consulted the Panel at its meeting on 15 June 2009. While members held divergent views on the three options presented by the Administration, a majority of members expressed support for the separation of the posts of the Chairman and CEO of EOC. The Administration has subsequently decided that the current position in respect of the Chairperson of EOC should be maintained, but the post of CEO at the level of Point 3 of the Directorate Pay Scale should be reinstated to oversee the administrative and operational matters, and to strengthen the governance of EOC.

Relevant issues raised by the Panel

5. It has been the practice for the Chairperson of EOC to brief the relevant Panel on its work on a regular basis. Mr LAM Woon-kwong, the former Chairperson of EOC who took office on 1 February 2010, briefed the Panel on his vision and the work of EOC at the Panel meeting on 10 February 2010. He also briefed the Panel on the draft revised Code of Practice on Employment ("CoP") under DDO at its meeting on 17 May 2010. The major issues raised by members at these meetings are summarized in the following paragraphs.

Role of EOC

6. Members pointed out that EOC had experienced a spate of incidents in recent years which affected adversely its credibility and that non-government organizations ("NGOs") had expressed dissatisfaction that EOC had confined itself to the enforcement of the anti-discrimination ordinances. In the view of NGOs, EOC had the duty to promote the culture of equal opportunities. Members asked Mr LAM Woon-kwong as to how EOC could restore public confidence in its work of promoting equal opportunities.

7. Mr LAM Woon-kwong stressed that EOC should be an advocate of equal opportunities, not merely a law enforcement agency. EOC should promote and disseminate the values of equal opportunities and anti-discrimination throughout society which would be a long-term task requiring the concerted efforts of NGOs and the Government.

8. Members in general supported the mission statement made by Mr LAM

Woon-kwong to promote awareness, understanding and acceptance of diversity and equal opportunities and provide education to prevent discrimination. They, however, pointed out that the public were concerned whether Mr LAM Woon-kwong, a former politically appointed principal official under the accountability system, could be truly independent and fair in discharging EOC's functions. Members also enquired whether EOC would enhance its transparency by opening up its meetings to the public.

9. Mr LAM Woon-kwong assured members that EOC would operate independently even though it was subvented by the Government. As the Chairperson, he would discharge his duty without fear and favour. He advised that EOC would discuss at its next meeting whether the meetings of EOC should be opened up, and if so, to what extent. The minutes of meetings of EOC were already made accessible by the public on its website.

10. Hon Fred LI raised an oral question at the Council meeting of 3 February 2010 on issues relating to EOC including the appointment of Mr LAM Woon-kwong as the Chairperson of EOC. The question and the reply of SCMA are in **Appendix I**.

Provision of legal assistance

11. Members had all along 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 granting legal aid. Members noted that EOC did not have an action fund for litigation and was not in a position to grant legal assistance for all meritorious cases. Under the present arrangement, EOC would assist an aggrieved person to seek legal aid from Legal Aid Department when needed. Members raised this issue of concern with Mr LAM Woon-kwong, pointing out that the EOC's funding for providing legal assistance was insufficient to enable the Commission to discharge its duty effectively (which was \$1.5 million under the Recurrent Account).

12. Mr LAM Woon-kwong advised that according to past statistics, many of the cases had been resolved by conciliation before legal proceedings were initiated. Of the cases taken to court, the legal expenses incurred by EOC were affordable and most of the trials had resulted in favour of EOC-assisted parties. Mr LAM Woon-kwong assured members that for meritorious cases which involved a question of principle, EOC would take them to court as long as there were sufficient evidence and a need to enhance and sustain public awareness. Should the amount in the Recurrent Account be insufficient to cover litigation costs, resort could be made by redeployment of internal resources. For

information on the legal assistance provided by EOC, including its consideration factors for providing legal assistance and the number of applications received by EOC between 1997 and 2009, members may wish to refer to a paper prepared by EOC for the Panel in March 2009 in **Appendix II**. According to EOC, its actual expenditures on legal assistance cases over the past years were \$528,000 in 2008, \$863,000 in 2009 and \$660,000 in 2010.

13. Members may wish to note that the former Subcommittee on Revised CoP on Employment under DDO has requested that a litigation fund similar to that for the Consumer Council should be established for EOC. EOC has also proposed to establish a specialized Equal Opportunities Tribunal to replace the District Court as the adjudicating body for discrimination cases. The Administration, however, has reservation about the proposal. Details of the EOC's proposal and the Administration's response were circulated to the Panel vide LC Papers No. CB(2)214/11-12(01) and (02) respectively on 1 November 2011.

Implementation of anti-discrimination laws

14. Referring to the suggestion made by some NGOs that the Administration should adopt an equality plan for all policy areas on the ground that the scope of protection afforded by RDO was too narrow, members enquired whether Mr LAM Woon-kwong would meet with those NGOs to understand their views on the equality plan and to follow up the deficiencies with the Administration. Members stressed that the Chairperson of EOC should act independently from the Government and should monitor the enforcement of equal opportunities in the Government.

15. Mr LAM Woon-kwong said that EOC had been meeting with NGOs to discuss the implementation of RDO and would continue to do so. As an advocate of equal opportunities, EOC would take the initiative to rectify any deficiencies identified and the support of the Government, LegCo and the public would be needed to implement its work.

16. Responding to members' enquiry on measures to be taken by EOC to help the ethnic minorities and the problem of discrimination against new arrivals from the Mainland who were not protected by RDO, Mr LAM Woon-kwong said that EOC had liaised with the Education Bureau to help ethnic minority students integrate into the mainstream system. EOC had also rendered assistance to new arrivals from the Mainland should they be discriminated on the grounds of sex, disability and family status. As the body to protect human rights, EOC would make known its concerns over any discrimination even if they were not covered by existing anti-discrimination ordinances.

17. Members expressed concern that while the Mass Transit Railway ("MTR") had offered half fare concession to persons with disabilities ("PWDs"), the definition of "disability" for the purpose of issuing certificates of disability, according to the Social Welfare Department, was however confined to persons who had lost two limbs or more out of four. Members considered it unfair to those who had lost one limb not being entitled to the fare concession. Members also suggested that other public transport operators should offer such fare concession. Mr LAM Woon-kwong said that EOC was willing to liaise with NGOs to explore the possibility of fare concession by other public transport operators and would step up its effort on the provision of barrier-free access and facilities in Hong Kong which was considered by PWDs to be fragmented.

18. Members took up the issue relating to barrier-free access for PWDs when Mr LAM Woon-kwong briefed the Panel on the draft revised CoP under DDO. They were concerned whether barrier-free access facilities provided to PWDs in workplaces were adequate and enquired about the responsibility of employers in the provision of reasonable accommodation to employees who had disabilities.

19. Mr LAM Woon-kwong explained that provision of barrier-free access facilities was not the sole responsibility of employers as developers and owners of commercial buildings also had their role to play. Under the provision of CoP under DDO, an employer had the responsibility to provide reasonable accommodation to an employee with a disability to fulfil the inherent requirements of a job. The provision of accommodation by an employer was not unlimited and EOC would provide conciliation to the parties concerned when required.

Recent development

20. On 5 March 2013, the Government announced the appointment of Dr York CHOW Yat-ngok as the new Chairperson of EOC for a term of three years commencing 1 April 2013. The new Chairperson of EOC will brief the Panel on the work of EOC at the next meeting on 17 June 2013.

Relevant papers

21. A list of relevant papers which are available on the LegCo website is in **Appendix III**.

LEGCO QUESTION NO. 1

(Oral Reply)

Asked by Hon LI Wah-ming

Date of meeting : 3 February 2010

Replied by :

Secretary for Constitutional and
Mainland Affairs

Question

The Government announced on 13 January this year that the Chief Executive ("CE") had accepted the recommendation of the Selection Board and appointed Mr LAM Woon-kwong, the former Director of CE's Office, as the Chairperson of the Equal Opportunities Commission ("EOC") for a term of three years. Moreover, in August last year, the Committee on the Elimination of Racial Discrimination of the United Nations ("the Committee") considered the report of the Hong Kong Special Administrative Region ("HKSAR") in accordance with the International Convention on the Elimination of all Forms of Racial Discrimination, and recommended in its concluding observations that the HKSAR should adopt "an equality plan with a view to ensuring the effective implementation of the law and that the Equal Opportunities Commission be strengthened". In this connection, will the Executive Authorities inform this Council:

- (a) given that many civic society organizations consider that the Chairperson of EOC must have commitment, in-depth knowledge and ample experience in promoting equal opportunities, whether the authorities have assessed if Mr LAM has met these requirements; if the assessment result is in the affirmative, of the track record of Mr LAM's actual work experience in this regard; and whether the authorities have considered if he can cooperate effectively with the civic society which promotes equal opportunities;
- (b) whether they have assessed if the appointment of a former politically appointed principal official under the accountability system as the Chairperson of EOC will affect the image of EOC, which should be independent, fair and impartial, and if it will cause the public to lose confidence that EOC can handle complaints against the authorities concerned in a proactive and impartial manner; and
- (c) how the authorities interpret the Committee's recommendation that HKSAR should adopt "an equality plan with a view to ensuring the effective implementation of the law and that the Equal Opportunities Commission be strengthened", and what new measures they will take to respond to this recommendation?

Reply

President,

- (a) The new EOC Chairperson was recruited through an open recruitment exercise, after the Selection Board had considered all candidates carefully in accordance with various objective criteria and made a recommendation to the Chief Executive on the suitable candidate. The relevant criteria include relevant administration and management experience, commitment to equal opportunities, vision, integrity, leadership qualities, personality, track record in public and community service, and communication skills.

Mr Lam Woon-kwong has rich experience in public administration. He possesses excellent leadership, management and communication skills and has a clear vision. Mr Lam had been the Secretary for Home Affairs. He is familiar with the work of the EOC and shows strong commitment to the relevant work. In the various positions in which Mr Lam had worked, he had to communicate and cooperate with different quarters of the community. Having considered all candidates in accordance with various objective criteria, the Selection Board considered Mr Lam to be the suitable candidate.

We believe that Mr Lam will bring with him a strong commitment to the EOC's work, and will lead the EOC to work with all sectors and strive to promote equal opportunities and eliminate discrimination in the community.

- (b) Mr Lam has been appointed as the Chairperson of the EOC because he is the suitable candidate. Even though he had been a politically appointed official previously, this does not affect the assessment of his suitability. We would like to emphasize that Government attaches considerable importance to the independence of the EOC. There are established mechanisms and arrangements, including relevant legal provisions and the Memorandum for Administrative Arrangements, to ensure that the EOC is independent from the Government. We believe that Mr Lam will lead the EOC to carry out its statutory functions in an impartial manner.

- (c) In the Concluding Observations made by the Committee on the Elimination of Racial Discrimination of the United Nations in August last year in relation to the report of the HKSAR under the International Convention on the Elimination of All Forms of Racial Discrimination, the Committee recommended, among others, "the adoption of an equality plan with a view to

ensuring the effective implementation of the law and that the Equal Opportunities Commission be strengthened”. We would like to emphasize that the Government is prohibited from practising racially discriminatory acts in the exercise of its functions under the Basic Law and the Hong Kong Bill of Rights Ordinance. The Race Discrimination Ordinance (RDO) also binds the Government in all the areas that it specified, such as employment, education and provision of services. Hong Kong has an extensive framework to deal with complaints against government departments. Any racially discriminatory act of the Government is also subject to the supervisory jurisdiction of the judiciary. In addition, we are putting in place a set of Administrative Guidelines on Promotion of Racial Equality to provide guidance to concerned bureaux, departments and public authorities to promote racial equality and ensure equal access to public services in key areas concerned. We are collecting the views of relevant organisations with a view to implementing the Guidelines and the checklist of measures as soon as possible.

As regards the EOC, we have provided extra resources to it for the implementation of the RDO. These include a special subvention of \$7 million for making preparatory arrangements such as conducting public education, publicity and promotion, and an additional subvention of \$5 million in the 2009-10 financial year for recruiting additional staff and organising community activities to implement the RDO and promote racial equality. We will continue to provide sufficient resources to the EOC to carry out its duties as necessary.

Legislative Council Panel on Constitutional Affairs

Legal Assistance provided by Equal Opportunities Commission

Purpose

Pursuant to Members' enquiries in the meeting held on 16 February 2009, this Paper provides information on legal assistance provided by the Equal Opportunities Commission (EOC) under the Sex Discrimination Ordinance, the Disability Discrimination Ordinance and the Family Status Discrimination Ordinance (the Ordinances).

Background

2. A person may lodge a complaint with the EOC in respect of an unlawful act under the Ordinances, and the EOC will investigate the complaint and will endeavour to effect a settlement between the parties¹.

3. After a complaint is lodged with the EOC, and if there is no settlement, any person who may take legal proceedings in respect of the unlawful act concerned may apply for assistance from the EOC (legal assistance) in respect of those proceedings².

4. The EOC's function of providing legal assistance under the Ordinances is distinct from other types of legal proceedings which the EOC may become involved. Where applicable, the EOC may also take proceedings in its own name under regulations made under the Ordinances³. The EOC may apply for judicial review, as it did in the case of *EOC v Director of Education* [2001] 2 HKLRD 690. The EOC may also provide amicus curiae to the courts, as it did in *Secretary for Justice v Chan Wah* [2000] 3 HKLRD 641, *Tsang Helen v Cathay Pacific Airways Ltd (No 2)* [2001] 4 HKC 585 and *Leung T C William Roy v Secretary for Justice* [2006] 4 HKLRD 211.

¹ SDO s.84, DDO s.80 and FSDO s.62

² SDO s.85(1), DDO s.81(1) and FSDO s.63(1)

³ Sex Discrimination (Proceedings by Equal Opportunities Commission) Regulation Cap.480C; Disability Discrimination (Proceedings by Equal Opportunities Commission) Regulation Cap.487C; Family Status Discrimination (Proceedings by Equal Opportunities Commission) Regulation Cap.527C

Factors considered by EOC

5. Under the Ordinances⁴, the EOC shall consider an application for legal assistance and may grant it if it thinks fit to do so, in particular where –

- (a) the case raises a question of principle; or
- (b) it is unreasonable, having regard to the complexity of the case or the applicant's position in relation to the respondent or another person involved or any other matter, to expect the applicant to deal with the case unaided.

6. The Ordinances enable the EOC to decide whether to provide assistance in each case as it thinks fit. The EOC may do so by reference to the priorities of its work. This is in line with former commissions in the UK operating under similar legislation before they were merged into a single commission⁵.

7. Applications for assistance are considered by the EOC's Legal and Complaint Committee. In deciding whether to provide assistance, the factors considered by Committee include:

- (a) Whether the case raises a question of principle;
- (b) Whether it is unreasonable, having regard to the complexity of the case or the applicant's position in relation to the respondent or another person involved or any other matter, to expect the applicant to deal with the case unaided;
- (c) The strength of the evidence;

⁴ SDO s.85(2), DDO s.81(2) and FSDO s.63(2)

⁵ For example, the former Commission for Racial Equality stated that it was "*obliged only to support cases which we consider suitable... Decisions are usually made on the basis of the strength of the case, but other factors also come into play, such as whether or not the case meets the CRE's priorities; whether the applicant already has, or could have, access to alternative representations...*" (<http://83.137.212.42/sitearchive/cre/legal/assistance.html>). In the UK, the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission were merged into the Equality and Human Rights Commission in October 2007.

- (d) The need to establish legal precedents;
- (e) The need to enhance and sustain public awareness;
- (f) The publicity impact on EOC's work in promoting equal opportunity if legal assistance is given;
- (g) Whether the case reinforces a policy issue emphasized by the EOC;
- (h) Whether suitable and effective remedy for the applicant could be obtained through legal proceedings;
- (i) Whether assistance has been granted in another case which will achieve the same purpose;
- (j) Whether the applicant has alternative resources, including legal aid;
- (k) The attitude and behaviour of the parties during the complaint handling process.

General information

8. As at February 2009 (**Annex I**), there have been 451 applications to the EOC for legal assistance, and the EOC have provided assistance in 190 applications (42%). Out of these 190 applications, 61 applications were settled before legal action was commenced. Legal action was commenced in 69 applications. The same legal action may deal with more than one application. From the 69 applications, there have been 58 legal actions.

9. Out of 58 legal actions, 33 legal actions were settled without a trial. There have been 15 trials; 13 trials have resulted in favour of the EOC assisted party; 2 trials have not resulted in favour of the EOC assisted party.

10. The legal expenses incurred by the EOC in providing assistance have been HK\$6,778,361.25. The settlement sums or damages awarded to EOC assisted party have been HK\$24,645,404.94.

11. While pregnancy discrimination and disability discrimination in employment constitute the majority of applications made to EOC, the EOC currently pays particular attention to applications involving accessibility to buildings and facilities for people with disabilities, sexual harassment, and family status discrimination in employment.

12. With regard to the strength of evidence, the EOC takes the view that it should provide assistance only if there are good prospects of establishing the facts contended. This approach is in line with the former UK commissions⁶.

13. According to the information of the Legal Aid Department (**Annex II**), from 2005 to 2007, there were 28 applications for legal aid under the Ordinances. There were 24 unsuccessful applications and 3 refusals on means.

14. In the UK, the former Disability Rights Commission supported 47 new legal cases in the year 2004/05⁷. The former Commission for Racial Equality provided full legal representation in 1 case in 2004 and 3 cases in 2005⁸.

Funding

15. At present, under the envelop funding approach, the EOC's legal expenses in relation to giving legal assistance are absorbed in the Recurrent Account. From 2005/06 up to the present, about HK\$1.5 million is set aside each year. Should this amount be insufficient, resort can be had to the General Reserve (except for funds designated for specific purposes). The General Reserve is currently around HK\$17 million.

Equal Opportunities Commission

March 2009

⁶ For example the former Disability Rights Commission stated that it "will fund individual need cases where there is exceptional individual need or hardship, such that without DRC support it is likely the disabled person will not be able to access the justice system. However, to warrant DRC support, as with cases involving points of legal principle, the prospects of success of the case must usually exceed 60% (prospects of success will be assessed as they would be with DRC support in place)" (Guide to DRC's Legal Case Selection Priorities, March 2006, paras. 1.6 and 1.7)

⁷ Disability Rights Commission Annual Report and Accounts 2004-05

⁸ Commission for Racial Equality Annual Report 2005

Table 1: Applications to the EOC for legal assistance from 1997 to February 2009

Ordinance	No. of applications for legal assistance	No. of applications withdrawn	No. of applications under consideration	No. of unsuccessful applications	No. of successful applications [a+b+c+d]	Status of applications provided with legal assistance			
						(a) not pursued (withdrawn by assisted person/ terminated by EOC)	(b) settled before proceedings commenced	(c) Proceedings commenced	(d) in progress
SDO	172	0	2	93	77	17	27	28	5
DDO	261	2	1	155	103	28	30	37	8
FSDO	18	0	1	7	10	2	4	4	0
Total no. of applications	451	2	4	255	190	47	61	69	13

Table 2: Legal actions assisted by the EOC from 1997 to February 2009

Ordinance	No. of EOC assisted legal actions [a+b+c+d]	Status of legal actions			
		(a) Settled out of court	(b) Court ruled in favour of the EOC assisted party	(c) Court ruled in favour of the Defendant	(d) On-going
SDO	22	13	6	2	1
DDO	34	18	7	0	9
FSDO	2	2	0	0	0
Total no. of legal actions	58	33	13	2	10



法律援助署
Legal Aid Department

Annex II
LC Paper No. CB(2)2187/07-08(01)

本署檔號 Our Ref.: LA/ADM 115/37 (C) II
來函檔號 Your Ref.: CB2/BC/2/06
電話 Tel.: 2867 4521
圖文傳真 Fax: 2537 2110

BY FAX 2509 9055 (Total page : 1)

5 June 2008

Ms. Flora Tai
Clerk to Bills Committee
Legislative Council
Legislative Council Building
8 Jackson Road
Central, Hong Kong

Dear Ms. Tai,

Re.: Bills Committee on Race Discrimination Bill

Thank you for your letter of 27.5.2008 enquiring information about applications for legal aid under the three existing anti-discrimination ordinances.

We provide the required information for the past 3 years as follows :-

	2005	2006	2007
No. of applications	5	8	15
No. of unsuccessful applications	5	7	12
No. of refusal on means	1	2	0

Yours sincerely,

(Ms. Juliana O.Y. Chan)
for Director of Legal Aid

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**Relevant documents on briefing by
the Chairperson of the Equal Opportunities Commission**

Committee	Date of meeting	Paper
Panel on Home Affairs ("HA Panel")	8.2.2002 (Item IV)	Agenda Minutes
	14.3.2003 (Item VI)	Agenda Minutes
Legislative Council	26.11.2003	Official Record of Proceedings Pages 235 - 302 (Motion moved by Hon Fred LI)
	2.6.2004	Official Record of Proceedings Pages 40 - 48 (Oral question raised by Hon Albert HO)
HA Panel	4.2.2005 (Item IV)	Agenda Minutes
Legislative Council	27.2.2008	Official Record of Proceedings Pages 46 - 47 (Written question raised by Hon Emily LAU)
Panel on Constitutional Affairs ("CA Panel")	17.11.2008 (Item III)	Agenda Minutes
	16.2.2009 (Item VI)	Agenda Minutes CB(2)1093/08-09(01)
	16.3.2009 (Item IV)	Agenda Minutes
	15.6.2009 (Item IV)	Agenda Minutes
Legislative Council	18.11.2009	Official Record of Proceedings Pages 87 - 89 (Written question raised by Hon LAU Kong-wah)
	3.2.2010	Official Record of Proceedings Pages 12 - 21 (Oral question raised by Hon Fred LI)

Committee	Date of meeting	Paper
CA Panel	10.2.2010 (Item IV)	Agenda Minutes CB(2)971/09-10(01)
	17.5.2010 (Item IV)	Agenda Minutes
Legislative Council	26.1.2011	Official Record of Proceedings Pages 132 - 252 (Motion moved by Hon CHEUNG Kwok-che)
Subcommittee on Revised Code of Practice on Employment under the Disability Discrimination Ordinance	11.5.2011	Agenda Minutes
House Committee	20.5.2011	Report of the Subcommittee on Revised Code of Practice on Employment under the Disability Discrimination Ordinance
CA Panel	21.11.2011 (Item II)	Agenda Minutes
Legislative Council	31.10.2012	Official Record of Proceedings Pages 96 - 100 (Written question raised by Hon WONG Ting-kwong)
	5.12.2012	Official Record of Proceedings Pages 95 - 97 (Written question raised by Hon WONG Yuk-man)