

立法會
Legislative Council

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(These minutes have been seen
by the Administration)

Panel on Constitutional Affairs

Minutes of meeting
held on Monday, 20 June 2016, at 2:30 pm
in Conference Room 1 of the Legislative Council Complex

Members present : Hon TAM Yiu-chung, GBS, JP (Chairman)
Dr Hon Priscilla LEUNG Mei-fun, SBS, JP (Deputy Chairman)
Hon CHAN Kam-lam, SBS, JP
Hon Emily LAU Wai-hing, JP
Hon Abraham SHEK Lai-him, GBS, JP
Hon Jeffrey LAM Kin-fung, GBS, JP
Hon Cyd HO Sau-lan, JP
Hon Starry LEE Wai-king, JP
Dr Hon LAM Tai-fai, SBS, JP
Hon CHAN Kin-por, BBS, JP
Hon IP Kwok-him, GBS, JP
Hon Paul TSE Wai-chun, JP
Hon LEUNG Kwok-hung
Hon WONG Yuk-man
Hon Claudia MO
Hon James TIEN Pei-chun, GBS, JP
Hon NG Leung-sing, SBS, JP
Hon Steven HO Chun-yin, BBS
Hon MA Fung-kwok, SBS, JP
Hon CHAN Chi-chuen
Hon CHAN Han-pan, JP
Dr Hon Kenneth CHAN Ka-lok
Hon Alice MAK Mei-kuen, BBS, JP
Hon Christopher CHEUNG Wah-fung, SBS, JP
Hon SIN Chung-kai, SBS, JP
Dr Hon Helena WONG Pik-wan
Hon IP Kin-yuen
Hon Martin LIAO Cheung-kong, SBS, JP
Dr Hon CHIANG Lai-wan, JP
Hon CHUNG Kwok-pan

Hon Tony TSE Wai-chuen, BBS
Hon Alvin YEUNG Ngok-kiu

Members attending : Hon Tommy CHEUNG Yu-yan, GBS, JP
Dr Hon Fernando CHEUNG Chiu-hung

Members absent : Hon LEE Cheuk-yan
Dr Hon LAU Wong-fat, GBM, GBS, JP
Hon WONG Kwok-hing, BBS, MH
Hon WONG Ting-kwong, SBS, JP
Hon CHAN Hak-kan, JP
Hon WONG Kwok-kin, SBS
Hon Mrs Regina IP LAU Suk-yee, GBS, JP
Hon Alan LEONG Kah-kit, SC
Hon CHAN Yuen-han, SBS, JP
Hon Dennis KWOK

Public Officers attending : Item II

Mr Ronald CHAN Ngok-pang, JP
Under Secretary for Constitutional and Mainland Affairs

Mr Gordon LEUNG Chung-tai, JP
Deputy Secretary for Constitutional and Mainland Affairs

Mr Ryan CHIU Pit-ming
Principal Assistant Secretary for Constitutional and
Mainland Affairs

Mr LI Pak-hong
Chief Electoral Officer
Registration and Electoral Office

Miss Jennie CHAN Cheuk-yin
Deputy Chief Electoral Officer
Registration and Electoral Office

Item III

Equal Opportunities Commission

Professor Alfred CHAN
Chairperson

Mr Michael CHAN
Chief Operations Officer

Dr Ferrick CHU
Director (Policy, Research and Training)

Mr Peter READING
Legal Counsel

Clerk in attendance : Ms Joanne MAK
Chief Council Secretary (2) 3

Staff in attendance : Mr Kelvin LEE
Senior Assistant Legal Adviser 3

Miss Cindy HO
Senior Council Secretary (2) 3

Miss Connie AU
Council Secretary (2) 3

Action

I. Information paper(s) issued since the last meeting

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

II. Proposed Guidelines on Election-related Activities in respect of the Chief Executive ("CE") Election ("the Proposed Guidelines") issued by the Electoral Affairs Commission ("EAC")
[LC Paper Nos. CB(2)1737/15-16, CB(2)1738/15-16(01) and (02)]

2. At the invitation of the Chairman, the Under Secretary for Constitutional and Mainland Affairs and the Chief Electoral Officer ("CEO") of the Registration and Electoral Office ("REO") briefed members on the salient points of the Administration's paper [LC Paper No. CB(2)1738/15-16(01)].

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Discussion

Election advertisements ("EAs")

3. Ms Claudia MO asked whether a person publishing an article to express appreciation of a certain CE candidate's capability in the run-up to the 2017 CE election would be considered to have published an EA. CEO said that the definition of "EA" was provided in section 2 of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) ("ECICO"), according to which any publicity materials published by any means "for the purpose of promoting or prejudicing the election of a candidate or candidates at the election" would be counted as EAs. In any particular case, the "intention to promote or prejudice the election of any candidates" had to be proven in considering whether the definition of "EA" was met.

4. Mr CHAN Chi-chuen and Mr Alvin YEUNG asked whether a Legislative Council ("LegCo") candidate could state in his/her election platform that he/she opposed a person who had declared intention to run for the 2017 CE election (including the incumbent CE if he had declared such an intention) to seek election as CE /re-election as CE for a second term. Mr CHAN Chi-chuen further asked whether a specimen of the election mail containing such a statement would be accepted for free postage. CEO said that it depended on whether the intent of the act was indeed to promote or prejudice the election of the candidate in the other election, and if so, it might be regarded as publishing an EA for that candidate. If that was the case, the statutory requirements for incurring election expenses would have to be observed.

5. Dr Kenneth CHAN asked whether a candidate could claim that he/she had the support of certain Chinese communist leaders. CEO advised that in accordance with section 27 of ECICO, if the name, logo or pictorial representation of any person or organization was included in an EA in such a way as to imply, or to be likely to cause electors to believe, that the candidate had the support of the person or organization concerned, the candidate was required to obtain consent of the person or organization concerned. Dr CHAN also requested REO to conduct publicity to promote clean elections targeting the Mainland organs in Hong Kong. CEO said that Dr CHAN's view would be relayed to the Independent Commission Against Corruption ("ICAC") for consideration.

6. Dr CHIANG Lai-wan and Mr WONG Yuk-man considered that the legal provisions remained unclear. Dr CHIANG recalled that in the run-up to the

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2016 LegCo New Territories East Geographical Constituency By-election, some newspapers had published articles to promote or prejudice the election of certain candidates but those articles had not been counted as EAs. CEO said that he was unable to comment on any specific case without the relevant concrete details. He added that complaints related to relevant breaches were to be followed up by ICAC.

Electioneering activities

7. Mr IP Kin-yuen expressed concern as to whether measures were in place to prevent an incumbent CE from having an unfair advantage by using public resources for his/her electioneering campaign in seeking re-election. Referring to the media reports that the Central Policy Unit had recently conducted a survey related to the 2017 CE election, Mr IP asked whether EAC would investigate into the matter to ascertain if relevant guidelines on election-related activities issued by EAC were contravened.

8. CEO advised that in accordance with paragraph 16.8 of the Proposed Guidelines, a candidate should not use any public resources for his/her electioneering campaign. However, any security, transportation, secretarial services and living quarters to which the candidate was entitled for his/her private purposes by virtue of his/her post or job were not treated as public resources in this context. That said, if any such services/living quarters were inevitably used for the candidate's electioneering campaign, the relevant part of the related costs had to be accounted for as his/her election expenses.

9. Dr Helena WONG was concerned that an incumbent CE might make use of his/her official residence to conduct canvassing activities in a very frequent manner, which might be seen as an unfair advantage over other candidates. CEO said that a list of common expenditure items which could be counted towards election expenses was at Appendix Q to the Proposed Guidelines, and that a CE seeking re-election had to separate the resources spent on his/her duties as CE from his/her election expenses and should include relevant particulars in his/her election return. Mr Paul TSE enquired how the cost of canvassing activities conducted in CE's official residence should be calculated when such cost was to be counted towards election expenses. CEO advised that there was no specific formula or rate for the apportionment of election expenses but, as a general principle, a candidate should adopt an objective and practicable means to apportion and calculate election expenses, such as taking the market rental of private premises in the locality as the basis of calculation.

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10. Dr Helena WONG considered that an incumbent CE or officials under the Political Appointment System seeking re-election/election as CE should take leave or resign before declaring candidacy. CEO said that the Proposed Guidelines had clearly set out that a politically appointed official should ensure that, when taking part in election-related activities, great care should be taken that there was no actual or potential conflict of interest with the business of the Government or his/her own official duties.

(Post-meeting note: The Administration subsequently advised that according to section 14 of the Chief Executive Election Ordinance (Cap. 569), a prescribed public officer (the definition of which includes officials under the Political Appointment System) is disqualified from being nominated as a candidate in the CE election.)

11. Mr WONG Yuk-man criticized that it was a waste of time and public resources to consult the public on the Proposed Guidelines given that only the 1 200 Election Committee members were eligible to vote in the 2017 CE election. Mr LEUNG Kwok-hung said that the existing election petition mechanism was unable to deal with the situation where an alleged illegal or corrupt conduct engaged by a CE-elect was discovered only after the period for lodging an appeal to the court had lapsed. He enquired whether the Administration would devise appropriate measures to plug the loophole. CEO advised that the issue raised by Mr LEUNG had to be addressed by review of legislation.

III. Briefing by the Chairperson of the Equal Opportunities Commission ("EOC")

[LC Paper Nos. CB(2)1738/15-16(03) to (04), CB(2)1754/15-16(01) and (02)]

12. At the invitation of the Chairman, the Chairperson of EOC briefed members on the salient points of the paper submitted by EOC [LC Paper No. CB(2)1738/15-16(03)].

Discussion

"Ladies' nights"

13. Mr Tommy CHEUNG expressed concern about the legal basis in relation to the "ladies' nights" case. He said that according to an opinion poll conducted by the Liberal Party on 30 May 2016 with 1 359 respondents

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(including 597 male and 762 female), 224 (16.5%) considered that the "ladies' nights" promotion was discriminatory while 893 (65.7%) considered it not discriminatory. He said that offering ladies' nights was just a promotional gimmick of entertainment venues with absolutely no intention of sex discrimination, and it was also a trade practice commonly adopted by entertainment venues worldwide. He said that the lawsuit had incurred a lot of legal costs to the defendant (i.e. the bar owner) and he believed that the ruling would deal a blow to the bar business sector. He asked about the amount of legal costs incurred to EOC for this case.

14. The Chairperson of EOC explained that under the Sex Discrimination Ordinance (Cap. 480) ("SDO"), a differential treatment in the provision of goods, facilities or services arising solely from a customer's sex might be unlawful. Currently, the law did not provide for any exemptions for business promotion and marketing behaviours. The Chairperson of EOC further explained that as the defendant did not appear in court to defend the case, the EOC lawyer applied for judgment in favour of the claimant and the application was granted by the court. Although the judgment was an uncontested one, it should be noted that the court would not have granted a default judgment if the claimant did not have a valid claim. The Chairperson of EOC said that EOC had met with the bar trade to explain EOC's intention of bringing this case to court, which was to raise public awareness of the relevant provisions of SDO and to seek redress for the complainant. The Chairperson of EOC added that as the case was handled by EOC lawyers, no additional costs were incurred to EOC.

15. Ms Claudia MO said that she personally did not consider that ladies' nights were discriminatory practices, and it was inappropriate for EOC to take legal action in this case. Mr Martin LIAO and Mr Paul TSE also considered that it did not serve a very meaningful purpose to bring the case to court. The Chairperson of EOC responded that in handling complaints, EOC would strive to dissolve disputes through conciliation, and legal action would be considered only as the last resort. Where conciliation was unsuccessful, a complainant or aggrieved party might apply to EOC for assistance in taking legal action. In considering whether legal assistance would be granted, EOC would consider a wide range of factors including whether the case raised a question of principle and whether the case could set important legal precedent. The Chairperson of EOC said that for the case in question, EOC did attempt to settle the case by conciliation but the defendant had not responded. He added that whether an individual case would constitute discrimination under the relevant Ordinance depended on the facts of the case.

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Education and employment opportunities for ethnic minorities ("EM")

16. Ms Claudia MO requested EOC to step up efforts to safeguard EM students' right to enjoy equal opportunities in receiving education and to tackle the difficulties they encountered in learning Chinese as a second language. The Chairperson of EOC said that the EM Unit of EOC had been monitoring the implementation of the "Chinese Language Curriculum Second Language Learning Framework" by the Government and the enhanced support for non-Chinese speaking students. Details of the work undertaken by EOC in this area were set out in paragraphs 20 to 22 of the EOC's paper. EOC was also actively exploring with the Education Bureau and other departments on ways of enhancing the career prospects of EM, including the new Qualification Framework (in Chinese competence), which might be a viable alternative for the EM school leavers. Details of the relevant work undertaken by EOC were set out in paragraphs 23 and 24 of the EOC's paper.

17. Pointing out that there were about 420 000 EM people in Hong Kong making up about 6% of the Hong Kong population, Mr James TIEN expressed concern about the social inclusion of EM. He believed that insufficient measures to address the problems encountered by EMs could bring serious social problems. The Chairperson of EOC said that EOC was committed to promoting the social inclusion of EMs in Hong Kong. In 2015, EOC set up the EM Unit to promote equal opportunities in education and employment for EM through a three-pronged approach of Policy Advocacy, Training and Outreach.

Race Discrimination Ordinance (Cap. 602) ("RDO")

18. In response to Ms Claudia MO's enquiry about EOC's view on the need to provide protection from racial discrimination in relation to the exercise of Government functions and powers, the Chairperson of EOC said that EOC had submitted its report on Discrimination Law Review ("DLR") to the Administration on 29 March 2016. The report contained 73 recommendations covering a wide range of issues relating to eliminating discrimination and promoting equality. EOC had recommended that RDO should be amended to provide that it was unlawful for the Government to discriminate in performing its functions or exercising its powers.

19. Mr Paul TSE expressed concern about the discrimination problems faced by the new arrivals from the Mainland and asked whether any legislative

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proposal would be taken forward to tackle discrimination on grounds of residency status in Hong Kong under RDO. The Chairperson of EOC said that the existing RDO did not cover discrimination on the basis of nationality, citizenship and residency status. In its report on DLR, EOC had recommended that the Government should conduct public consultation and introduce protection from discrimination on grounds of nationality and citizenship under RDO.

Accessibility in premises

20. Mr Paul TSE expressed concern that buildings built before 2008 were not obliged to comply with the building standards set out in the "Design Manual - Barrier Free Access 2008" ("Design Manual"). He requested EOC to make further efforts to strengthen the provision of barrier-free access. The Chairperson of EOC said that EOC had called on the Government to consider amending the relevant regulations made under the Buildings Ordinance (Cap. 123) to require pre-2008 buildings to incorporate barrier-free facilities in accordance with the requirements in the Design Manual, and to review and update the requirements under the Design Manual in order to meet the latest international standards as a matter of priority. In addition, the Government should incorporate the concepts and principles of "universal design" in the formulation and implementation of policies, as well as in the development of new Government projects.

Pregnancy discrimination cases

21. Mr Paul TSE expressed concern that pregnancy discrimination remained the major area of complaints received by EOC, and enquired about the action taken by EOC to tackle discrimination experienced by pregnant employees and the issue of unfavourable treatment of breastfeeding mothers in the workplace. The Chairperson of EOC said that the findings of the "Study on Pregnancy Discrimination and Negative Perceptions Faced by Pregnant Women and Working Mothers in Small and Medium Enterprises ('SMEs')" released in May 2016 showed that unfavourable treatment of pregnant employees and working mothers was occurring in the Hong Kong SME workplace. Based on the findings, EOC had made a number of recommendations for action by the Government and other key stakeholders. EOC had also been advocating for stronger policies and infrastructure, including friendly workplace policies, to enable mothers to breastfeed their child. As part of its advocacy effort, EOC would actively promote the provision of breastfeeding facilities in both public places and commercial premises.

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Legal protection for sexual minorities from discrimination

22. Noting that it was the position of EOC that the Government should consider conducting public consultation on the introduction of legislation to prohibit discrimination on the grounds of sexual orientation, gender identity and intersex status as soon as possible, Mr CHAN Chi-chuen asked whether EOC would, in the face of the opposition expressed by some organizations, backtrack on its stance. To facilitate the implementation of the above EOC's recommendation by the Government, Mr CHAN suggested that EOC should undertake the necessary preparatory work as far as possible.

23. The Chairperson of EOC said that EOC had submitted its report on the "Study on Legislation against Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status" to the Government. He further said that in the past two months, he had met with more than 30 organizations to gain a much deeper understanding about the discrimination faced by sexual minorities. The Chairperson of EOC said that through meetings with various stakeholders, he was pleased to note that both the camps in support and opposition of the legislation had reached a clear consensus on the issue, including the need to protect sexual minorities from discrimination and to safeguard their right to equal opportunities by enacting legislation. In response to Ms Emily LAU's question as to how he would respond to the opposition against enacting such legislation as expressed by some people, the Chairperson of EOC said that he was steadfast in pursuing the implementation of the aforementioned recommendation with the Government.

24. Dr Priscilla LEUNG requested to put on record that she together with a number of organizations and groups had met with the EOC Chairperson to express their strong opposition against enacting legislation to deal with discrimination on the grounds of sexual orientation, gender identity and intersex status. While agreeing that the Administration should tackle the issue by strengthening measures such as publicity and mediation service, Dr LEUNG considered that the use of legislative means was inappropriate and queried the basis for EOC's recommendation. Dr LEUNG urged EOC to reconsider the issue.

Appointment of the Chairperson of EOC

25. Mr WONG Yuk-man expressed doubt about the suitability of Professor Alfred CHAN to be the Chairperson of EOC and his commitment to promoting

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the work of EOC. Mr LEUNG Kwok-hung said that Professor CHAN was reportedly not fully familiar with the work of EOC. Dr Fernando CHEUNG expressed similar concern and urged the Chairperson of EOC to gain a better understanding of the situations of the vulnerable groups in Hong Kong. He suggested that the Administration should consider the suggestions earlier made by Ms Anna WU, the former EOC Chairperson, regarding the mechanism for appointing members to advisory and statutory boards, such as that the Government might adopt the practice of the United Kingdom to appoint an independent commissioner responsible for overseeing such appointments. Dr CHEUNG added that the Administration should also review the mechanism for appointing the Chairperson of EOC to ensure that it was in line with the Paris Principles.

26. The Deputy Secretary for Constitutional and Mainland Affairs ("DSCMA") said that CE had appointed Professor Alfred CHAN as the EOC Chairperson under the provisions of SDO. Since 2009, the Chairperson of EOC had always been appointed through open recruitment and the same procedure had also been adopted for the appointment of the new Chairperson. DSCMA further said that an open recruitment exercise was launched in September 2015. The Administration had set up a selection board and engaged a human resources consultant in conducting the recruitment exercise. Having considered a total of 144 candidates, the selection board recommended the appointment of Professor Alfred CHAN for the post. After considering the recommendation of the selection board, CE appointed Professor CHAN as the Chairperson of EOC.

Funding support from the Government

27. Ms Cyd HO urged the Administration to increase allocation of resources to EOC to ensure that EOC had adequate funding to cover its recurrent expenditure and to maintain smooth operation. She noted with concern that the projected amount of legal fees for 2016-2017 was \$1.75 million against a provision of only \$0.46 million by the Government. Besides, to cover the increase in office rent (about \$5.22 million per annum), EOC had to tap into its reserve to cover the expenditure. Noting that EOC had reinstated the post of Chief Operations Officer on the recommendation of the Director of Audit, Ms HO considered it inappropriate for the Administration to withhold the subvention of \$2.96 million for the post of Chief Operations Officer in 2016-2017. The Chairman requested the Administration to take note of members' concern regarding the resources constraint of EOC.

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IV. Any other business

28. There being no other business, the meeting ended at 4:40 pm.

Council Business Division 2
Legislative Council Secretariat
23 August 2016