

立法會
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Panel on Constitutional Affairs

**Minutes of special meeting
held on Saturday, 20 November 2010, at 9:00 am
in the Chamber of the Legislative Council Building**

- Members present** : Hon TAM Yiu-chung, GBS, JP (Chairman)
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP (Deputy Chairman)
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Hon CHEUNG Man-kwong
Hon LAU Kong-wah, JP
Hon Miriam LAU Kin-ye, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon WONG Kwok-hing, MH
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon CHEUNG Hok-ming, GBS, JP
Hon WONG Ting-kwong, BBS, JP
Hon CHIM Pui-chung
Prof Hon Patrick LAU Sau-shing, SBS, JP
Hon CHAN Kin-por, JP
Dr Hon Priscilla LEUNG Mei-fun
Hon IP Kwok-him, GBS, JP
Hon Paul TSE Wai-chun
Dr Hon Samson TAM Wai-ho, JP
Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung
Hon WONG Yuk-man
- Members absent** : Hon Albert HO Chun-yan
Dr Hon Margaret NG
Dr Hon Philip WONG Yu-hong, GBS
Hon WONG Yung-kan, SBS, JP
Hon LAU Wong-fat, GBM, GBS, JP

Hon Timothy FOK Tsun-ting, GBS, JP
Hon LEE Wing-tat
Hon Ronny TONG Ka-wah, SC
Hon Cyd HO Sau-lan
Dr Hon LAM Tai-fai, BBS, JP
Hon WONG Kwok-kin, BBS
Hon Mrs Regina IP LAU Suk-ye, GBS, JP
Hon Tanya CHAN

Public Officers : The Administration
attending

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

Office of the Privacy Commissioner for Personal Data

Mr Allan CHIANG Yam-wang
Privacy Commissioner for Personal Data

Ms Brenda KWOK Mei-ling
Acting Deputy Privacy Commissioner for Personal Data /
Chief Legal Counsel

Ms Sandra LIU I-yan
Legal Counsel

Attendance by : Hong Kong Human Rights Monitor
invitation

Mr LAW Yuk-kai
Director

Young Democratic Alliance for Betterment of Hong Kong

Mr Holden CHOW
Chairman

Democratic Party

Mr SIN Chung-kai
Deputy Spokesperson of Human Rights Policy

Society for Community Organization

Mr TSOI Yiu-cheong, Richard
Community Organizer

Hong Kong Direct Marketing Association

Mr Eugene R Raitt
Chairman

Hong Kong Telemarketer Association

Mr TAM Lok-wai, Patrick
Secretary

Hong Kong Exhibition and Convention Industry Association

Mr Daniel CHEUNG
Chairman

Teledirect Hong Kong Ltd.

Mr Michael Cowell
Managing Director

Hong Kong Call Centre Association

Mr Rayland CHAN
Executive Director

The Hong Kong Federation of Insurers

Ms Agnes CHOI
Governing Committee member

Public Services Monitoring Group

Mr CHAN Chi-hang
Representative

Mr Roderick WOO
Former Privacy Commissioner for Personal Data

Professor John Bacon-Shone
Former Chairman of the Law Reform Commission
Sub-committee on Privacy

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

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

Ms Wendy LO
Senior Council Secretary (2)4

Mrs Fanny TSANG
Legislative Assistant (2)3

Miss Lulu YEUNG
Clerical Assistant (2)3

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- I. Report on Public Consultation on Review of the Personal Data (Privacy) Ordinance ("the Consultation Report")**
[LC Paper Nos. CB(2)37/10-11(02) to (03), CB(2)314/10-11(01), CB(2)317/10-11(01) to (05), CB(2)353/10-11(01) to (03), CB(2)354/10-11(01) to (02), CB(2)363/10-11(01) to (02), CB(2)379/10-11(01) and CB(2)443/10-11(01)]

Members noted the paper provided by the Privacy Commissioner of Personal Data ("PCPD") on his views on the Report on Public Consultation on Review of the Personal Data (Privacy) Ordinance ("Consultation Report") [LC Paper No. CB(2)314/10-11(01)] and the updated background brief on "Review of the Personal Data (Privacy) Ordinance ("PDPO") (Cap. 486)" prepared by the Legislative Council Secretariat [LC Paper No. CB(2)37/10-11(03)].

Presentation of views

Oral presentation by deputations/individuals

2. A total of 13 deputations and individuals presented their views on the Consultation Report at the meeting, a summary of which was issued to members vide LC Paper No. CB(2)582/10-11(06) on 16 December 2010.

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Members also noted the written submissions from Mr KAM, FGG, and Mr YEUNG Wai-sing, member of Eastern District Council, which were tabled at the meeting [subsequently issued vide LC Paper No. CB(2)317/10-11(04) to (05) and LC Paper No. CB(2)353/10-11(03) respectively].

Views of PCPD

3. PCPD highlighted his views on the Consultation Report as follows -

- (a) some proposals to step up the protection of personal data privacy which would not be pursued by the Administration, namely, revamping regulatory regime of direct marketing, enhancing sanctioning powers of PCPD, tackling privacy concerns caused by data processors and outsourcing activities and harnessing impact on personal data privacy caused by technological advancement, as set out in his paper [LC Paper No. CB(2)314/10-11(01)] had to be taken forward by amending PDPO in order to bring the Ordinance in line with public expectations and international standards;
- (b) recent serious contraventions of PDPO and unauthorized sale of personal data, in particular, had reflected the inadequacy of the enforcement power of PCPD in meeting the public expectation for sanctioning a data user in serious breaches of Data Protection Principles ("DPPs"). For instance, practices of the banking industry to seek the customer's consent to the conditions of some bundled services, the collection and use of personal data without offering an informed choice for customers to refuse acceptance of direct marketing materials, and transfer of personal data for profits which contravened the requirement of the *Guidance on the Collection and Use of Personal Data in Direct Marketing* recently issued by PCPD had continued. This reflected that the sanctioning powers of PCPD had to be enhanced to ensure compliance of PDPO by enterprises; and
- (c) a central "Do-not-call" register should be set up to deal with person-to-person telemarketing and it was encouraging that the Hong Kong Federation of Insurers had found the proposal acceptable.

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Discussion

Sanctioning powers of PCPD

Criminal investigation and prosecution power

4. Ms Emily LAU said that the Democratic Party supported granting more powers including criminal investigation power to PCPD in order to strengthen the protection of personal data privacy. She considered that the Panel should form a subcommittee to study the review of PDPO and related issues.

5. Noting that both the incumbent and former PCPD and some deputations shared the view that PCPD should be granted criminal investigation and prosecution power to step up protection of personal data privacy, Mr WONG Kwok-hing sought explanation from the Administration on the reason for not taking on board that proposal given that some statutory bodies such as the Securities and Futures Commission ("SFC") had already been granted such powers. He also asked how the Administration would address the issues arising from inadequacy of sanctioning powers of PCPD. He was concerned that in the absence of the proposed sanctioning powers, PCPD would remain to be a "toothless tiger". Mr WONG also invited PCPD and Mr Roderick WOO, the former PCPD to elaborate their grounds for supporting the granting of criminal investigation and prosecution power to PCPD.

6. Mr Roderick WOO said that under the existing PDPO, PCPD had to serve notice on the relevant data user before entering premises for investigation and PCPD did not have adequate power to search and seize evidence for the investigation into the Octopus incident. He informed members that some of the information in the documents provided by the Octopus Holdings Limited had been obliterated and its staff had refused, claiming privilege against self-incrimination, to provide information to PCPD. PCPD's requests for copies of some documents and access to certain areas of premises were also denied. PCPD supplemented that in the absence of criminal investigation power, PCPD could only rely on the cooperation of data users to provide the information required to facilitate his investigation. He also stressed that PCPD's proposal entailed only PCPD conducting the actual prosecution. The discretion whether or not to prosecute and the power to judge the culpability of any data user shall still vest with the Department of Justice ("DoJ") and the Judiciary respectively.

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7. In response, Under Secretary for Constitutional and Mainland Affairs ("USCMA") made the following points -

- (a) under the existing PDPO, PCPD could issue enforcement notices in cases where contravention of DPPs were involved. PCPD was also granted the power to request the relevant data user to provide information and enter premises for the purposes of an investigation. If necessary, PCPD could, pursuant to a warrant issued by a magistrate under section 42 of PDPO, exercise his power to enter premises to conduct investigation without serving notice to the relevant data user;
- (b) the privilege against self-incrimination was an important legal principle which should be upheld. PCPD could exercise his investigation power available under the existing framework of PDPO;
- (c) the prosecution powers of some statutory bodies such as the Vocational Training Council and the Employees Compensation Assistance Fund Board were limited to individual trades and sought to handle offences which were mostly minor or of a simple nature. PDPO, however, had a broader coverage and the penalties for offences under it involved fines and imprisonment; and
- (d) the Administration maintained its view that PCPD should not be provided with the power to carry out criminal investigations and prosecutions as it was important to retain the existing arrangement under which criminal investigation and prosecution were undertaken respectively by the Police and DoJ in order to maintain checks and balances.

8. Ms Audrey EU said that she appreciated that from the viewpoint of the general public, it would be best for PCPD to have all the powers including criminal investigation, prosecution and awarding compensation so that his Office could provide "one-stop" services if they felt aggrieved. However, she was concerned that it was against the principle of natural justice to confer on any single statutory body too much power in discharging its duties. While expressing support that PCPD should have investigation power, she cautioned that a balance had to be struck between enhancing the

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protection of the privacy of the general public and complying with commonly accepted principles. The Deputy Chairman shared similar view, saying that it was not appropriate to grant a single body too much power so as to ensure checks and balances.

9. Mr Paul TSE took the view that strong justifications would be required for concentrating criminal investigation and prosecution powers in a single body in specific domains as the existing practice of vesting in separate authorities the powers of criminal investigation, prosecution and judging on criminal cases had been functioning well. Regarding the investigation of the Octopus incident, he agreed that the privilege against self-incrimination was an important legal principle that should continue to be upheld. In his view, it was understandable that for the sake of protecting privacy, the Octopus Holdings Limited had to obliterate information relating to personal data. He added that while the personal data policy should be reviewed to keep pace with social changes, radical reform was undesirable.

10. Mr Holden CHOW of Young Democratic Alliance for Betterment of Hong Kong concurred with the view that PCPD should not be provided for the powers to carry out criminal investigations and to prosecute. He used a case relating to SFC as detailed in his submission [LC Paper No. CB(2)443/10-11(01)] as an illustration, saying that the existing arrangement under which criminal investigation and prosecution were undertaken respectively by the Police and DoJ should be retained.

11. In response to the concerns about granting criminal investigation and prosecution powers to PCPD, Mr Roderick WOO made the following points -

- (a) the Office of PCPD had put forward four proposals to strengthen the protection of personal data privacy for the Administration's consideration, i.e. empowering PCPD to carry out criminal investigation and prosecution; awarding compensation to aggrieved data subjects; imposing monetary penalty on serious contravention of DPPs and providing legal assistance to data subjects under section 66 of PDPO. Although section 66 of the existing PDPO provided an aggrieved data subject with the right to institute legal proceedings to seek compensation, there was not a single civil claim for compensation in the past 14 years since the implementation of PDPO as the aggrieved individuals generally

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did not have the resources to file lawsuits. The main objective of the PCPD's proposals was to step up protection of personal data privacy and provide access to justice to aggrieved data subjects;

- (b) in performing the statutory functions under the existing PDPO, PCPD had investigated infringement of personal data privacy which could be regarded as partial criminal investigation. It would be appropriate to confer PCPD with criminal investigation and prosecution powers as PCPD was proficient in interpreting and applying the provisions of PDPO and possessed first-hand information to carry out investigation in a speedy manner;
- (c) as illustrated in the comparison table he previously submitted in his capacity of PCPD to the Panel on the functions carried out by Office of The Ombudsman and the Equal Opportunities Commission ("EOC") and the Office of PCPD [LC Paper No. CB(2)1146/09-10(01)], the three statutory bodies were not directly comparable as PCPD had to oversee the protection of personal data privacy in both the private and public sectors; and
- (d) regarding the investigation into the Octopus incident, he clarified that the information obliterated by the Octopus Holdings Limited did not contain any personal data. The investigation work of PCPD would be hampered if access to certain information was denied by data users.

Provision of legal assistance and other sanctioning powers

12. Ms Audrey EU expressed support that PCPD should be empowered to provide legal assistance to an aggrieved data subject to institute legal proceedings to seek compensation under section 66 of PDPO, based on the models of EOC and the Consumer Council. She suggested that a fund similar to the Consumer Legal Action Fund should be set up to give aggrieved data subjects greater access to legal remedies. That apart, PCPD should seek to mediate any complaint or claim for compensation before resorting to legal action.

13. Ms Agnes CHOI of the Hong Kong Federation of Insurers expressed the view that it was not appropriate for PCPD to provide legal assistance to an aggrieved data subject as the legal aid system was well-established in Hong Kong.

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14. Mr Holden CHOW of Young Democratic Alliance for Betterment of Hong Kong and Mr CHAN Chi-hang of Public Services Monitoring Group, however, supported the provision of legal assistance by PCPD to aggrieved data subjects on the grounds that it provided another channel for the public to seek financial assistance other than the existing legal aid system which required the applicants to satisfy the means test and the merits test.

15. PCPD informed members that the United Kingdom ("UK") Data Protection Act had provided the Information Commissioner's Office in UK the power to impose monetary penalty on serious contravention of its privacy law since April 2010 and the Australian Privacy Act also provided the Australian Privacy Commissioner the power to award compensation to aggrieved data subjects. He had made reference to those overseas experiences when suggesting to the Administration that PCPD should be empowered to impose monetary penalty on serious contravention of DPPs.

PCPD

16. The Chairman requested PCPD to provide information on the sanctioning powers of relevant overseas law enforcement authorities for members' reference as far as practicable.

"Opt-in" and "opt-out" mechanism for collection and use of personal data

17. Mr CHAN Kin-por expressed support for adopting an "opt-out" mechanism for using personal data for direct marketing purpose on the grounds that it had been adopted by most Western countries and the Administration had already proposed to introduce additional specific requirements to strengthen the regulation over the collection and use of personal data in direct marketing as well as sale of personal data. Noting the view of PCPD that direct marketing activities would become more cost effective and less annoying as the quality of the telemarketing calls in terms of their acceptability to the recipients and the success in closing a sale would improve with the adoption of an "opt-in" mechanism (paragraph 9 of the PCPD's paper), he sought elaboration from PCPD on his stance and invited views of deputations on the "opt-in" and "opt-out" mechanism.

18. Mr Eugene R Raitt of Hong Kong Direct Marketing Association agreed that stringent regulations should be introduced to afford better protection of personal data privacy and supported the Administration's proposals to introduce new requirements and criminal offences to enhance deterrent effects. He, however, was of the view that in view of the practical difficulties in requesting the data subjects to read through the Personal

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Information Collection Statement ("PICS") to give express consent under the "opt-in" mechanism, an opt-out mechanism should continue to be adopted for direct marketing purpose with more specific requirements added to ensure transparency and full disclosure of information to allow consumers to opt out easily for each intended direct marketing purpose. He stressed that same as an "opt-in" mechanism, an "opt-out" mechanism could also offer a choice to data subjects to indicate their preferences clearly.

19. In response to the enquiry of Ms Emily LAU, Mr Eugene R Raitt informed members that according to the survey conducted by the Hong Kong Direct Marketing Association with the assistance of other major direct marketing associations in Asian and Western countries, there was no country where an "opt-in" mechanism had been adopted universally for direct marketing and the "opt-in" mechanism had only been adopted for e-mail marketing in some overseas countries. He cautioned that the direct marketing industry would be seriously affected if an "opt-in" mechanism was to be adopted.

20. While indicating his inclination to support the continued adoption of an "opt-out" mechanism in direct marketing activities, Mr Roderick WOO, said that the crux of the issue was to ensure that the personal data of the public were used for the intended purposes for which the data were collected.

21. Mr Paul TSE was of the view that an "opt-out" mechanism should be adopted for direct marketing purpose as it was against human nature to expect consumers to read PICS in detail before exercising their choices to opt in. However, he considered that data users should have the obligation to stipulate clear provisions for data subjects to indicate their choice.

22. While supporting that an "opt-out" mechanism should be adopted for direct marketing purpose to facilitate business developments, the Deputy Chairman emphasized that it was important to ensure that personal data were used for the intended purposes for which the data were collected. She added that while it was crucial to have PDPO reviewed to keep abreast of social changes, PCPD should step up its communication with the business sectors so that they would be clearly notified of any new requirement under PDPO.

23. Stressing that the intrusion of privacy was a serious matter and any resulting harm might not be remediable, Ms Audrey EU opined that an "opt-out" mechanism did not afford adequate safeguards to the personal data

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privacy as explicit consent of consumer was not required. She invited views on how the problem should be addressed.

24. Mr LAW Yuk-kai of Hong Kong Human Rights took the view that an "opt-in" mechanism should be adopted for affording better protection to consumers as data users would need to state clearly the purposes for the collection and use of the data for the consideration of data subjects. A blanket refusal to adopt an "opt-in" mechanism was not justified as the mechanism did not have to be implemented across-the-board and there could be different modes of implementation in different sectors such as the exhibition and convention industry in which only basic business contacts with no sensitive personal information would be collected.

25. Mr CHAN Chi-hang of Public Services Monitoring Group took the view that an "opt-in" mechanism should be adopted for direct marketing activities except for membership schemes which rewarded consumers with promotional benefits for collection of their personal data.

26. Mr TSOI Yiu-cheong of Society for Community Organization stressed that the direct marketing industry should come up with proposals on how the personal data of consumers could be better protected if an "opt-out" mechanism was to be adopted. In his view, restrictions should be imposed to prohibit enterprises from intruding into and transferring of personal data of customers such as using the personal data of customers for telemarketing without their consent.

27. Professor John BACON-SHONE, former Chairman of the Law Reform Commission Sub-committee on Privacy opined that the difference between an "opt-in" mechanism and an "opt-out" mechanism was that the former required the data users to list clearly the purposes for the collection and use of the data to seek the explicit consent of data subjects while the latter did not. If an "opt-out" mechanism was to be adopted, clear provisions for data subjects to indicate their choice should be provided. In most cases, however, data users were not willing to disclose full information to consumers unless they were obliged to do so. In his view, the most effective way to strengthen protection of personal data privacy was to provide data subjects with the right to retain control over their personal data such as the right to know about transfer destinations of their personal data and the right to correct or delete their personal data. Mr TSOI Yiu-cheong concurred.

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28. Pointing out that the French Government had recently adopted an "opt-in" mechanism to regulate email marketing activities, PCPD reiterated that he maintained the view that an "opt-in" mechanism for direct marketing purpose should be adopted in Hong Kong so as to keep in line with the world trend towards better protection of personal data privacy. Noting the concerns about the adoption of an "opt-in" mechanism, he suggested that interim arrangements could be put in place as appropriate to mitigate any potential impact on commercial operations. For instance, a central "Do-not-call" register on person-to-person telemarketing against direct marketing activities could be introduced at an initial stage to regulate unsolicited promotion calls which were prevalent in Hong Kong due to the comparatively low operational cost and high usage of mobile phone service. PCPD added that he had also suggested to the Administration to impose on a direct marketer to disclose the source of the personal data upon the data subject's request so that the data subject can trace the culprit suspected of contravention of PDPO as a way to eradicate the practice of unsolicited telemarketing calls.

29. Mr Eugene R Raitt of Hong Kong Direct Marketing Association said that while he did not object to the adoption of an "opt-in" mechanism in e-mail marketing, he maintained the view that an enhanced "opt-out" mechanism with full disclosure of information to consumers should be adopted for direct marketing activities in general to cover various marketing channels in addition to e-mail marketing. He emphasized that consumers should have the responsibility to read through PICS before making their choices. Only an "opt-out" mechanism could strike a balance between safeguarding the personal data privacy of consumers and facilitating the business operations of direct marketers.

30. Mr TAM Lok-wai of Hong Kong Telemarketer Association said that the direct marketing industry had provided many employment opportunities to young people and housewives. He and Mr Michael Cowell of Teledirect Hong Kong Limited cautioned that if an "opt-in" mechanism was to be adopted for direct marketing purpose, the operating cost of direct marketing companies would increase and many frontline staff would be laid off as it would be unlikely for consumers to give express consent to receive telemarketing calls.

31. USCMA made the following responses -

- (a) the Administration noted the concerns of the community that the existing legislation was not specific enough to afford

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adequate protection to personal data privacy. In this regard, the Administration proposed to introduce in PDPO additional specific requirements on data users who intended to use (including transfer) the personal data collected for direct marketing purposes. Under the Administration's proposal, the data user's PICS should be reasonably specific about the intended direct marketing activities (whether by the data user himself/herself or the transferee(s)), the classes of persons to whom the data may be transferred for direct marketing purposes and the kinds of data to be transferred for direct marketing purposes; and

- (b) regarding the issue of bundled consent, the data user should, on or before collecting the personal data, provide an option for the applicant to choose not to agree to the use (including transfer) of his/her personal data for any of the intended direct marketing activities or the transfer of the data to any class of transferees.

32. In response to the enquiry of Ms Emily LAU on the staff redundancies in the direct marketing sector arising from the Octopus incident, Mr Michael COWELL of Teledirect Hong Kong Limited advised that the Office of the Commissioner of Insurance had requested insurers to suspend all direct marketing activities after the Octopus incident until PCPD had issued relevant guidelines on direct marketing on the new requirement. The incident had an adverse impact on the business of a number of the direct marketing companies which had all along been compliant with the existing PDPO. Ms Emily LAU requested the Administration to check with the Office of the Commissioner of Insurance as to whether it was indeed the case.

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Implementation of section 33 of PDPO

33. Ms Emily LAU considered that section 33 of PDPO, the only provision under PDPO which had not commenced operation, should be brought into operation as soon as practicable to prohibit the transfer of data by data users to another territory where comparable privacy protection was lacking. She invited views from deputations on the possible impact on relevant industries.

34. Mr Eugene R Raitt of Hong Kong Direct Marketing Association indicated support for the implementation of section 33 of PDPO which, in

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his view, would not have any adverse impact on the direct marketing industry. He pointed out, however, that enforcement of the provision could be an issue.

35. Mr TSOI Yiu-cheong of Society for Community Organization echoed the view that section 33 of PDPO should be brought into operation as soon as possible. He considered that commencement of section 33 would also necessitate PCPD and the Administration to strengthen cooperation with other countries in the protection of personal data privacy.

36. Mr Paul TSE said that as many data users had to rely on their offshore back offices and agencies in nearby regions for processing and handling of personal data nowadays, implementation of section 33 of PDPO would have far-reaching implications on cross-boundary business operations. He considered that if the provision was to be brought into operation, careful re-assessment of the impact on industries concerned would be warranted in view of the technological advancement and prevalence of cross-boundary business operations in recent years. Sharing her experience in managing a world-wide database on laws, Dr Priscilla LEUNG expressed similar concern that it would not be practical and feasible to regulate data processing on cross-boundary business operations which were conducted speedily through internet in a competitive business environment. In her view, it had not been carefully thought through when section 33 of PDPO was enacted.

37. Mr Daniel CHEUNG of Hong Kong Exhibition and Convention Industry Association echoed the view that implementation of section 33 of PDPO might affect the operation of the exhibition and convention industry as transfer of data to overseas countries to facilitate organization of trade fairs was a frequent and common practice.

38. Professor John BACON-SHONE, former Chairman of the Law Reform Commission Sub-committee on Privacy, was of the view that the implementation of section 33 of PDPO was not a key issue in affording better protection of personal data privacy. He considered that the right of the consumers to retain control over their personal data was essential. The Deputy Chairman concurred with the view.

Other issues

39. Ms Emily LAU said that the Administration should clarify whether PDPO would be applicable to the offices set up by the Central People's

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Government in the Hong Kong Special Administrative Region. Pointing out that the Administration had turned down PCPD's non-recurrent bid for permanent office accommodation, Ms Emily LAU was concerned that the Office of PCPD was not provided with sufficient resources to carry out its functions. Ms Audrey EU also indicated support for granting more resources and manpower to the Office of PCPD in discharging its functions.

Administration's response to major issues raised by the meeting

40. On "opt-in" mechanism versus "opt-out" mechanism, USCMA advised that -

- (a) the Administration proposed to impose additional specific requirements on data users for the collection and use of personal data for direct marketing, as well as for the sale of personal data. These requirements would be applied irrespective of which mechanism was to be adopted;
- (b) making reference to the requirements under the Unsolicited Electronic Message Ordinance, the Administration proposed in the consultation report to adopt the "opt-out" mechanism to further strengthen the protection of personal data privacy of consumers; and
- (c) the Administration would continue to listen to the views of the public and arrange in-depth discussions with different sectors of the community and stakeholders during the further public discussions period until the end of December 2010. The Administration would have regard to any possible impact on relevant industries and decide on the mechanism to be adopted with a view to striking a balance between safeguarding the personal data privacy of the public and facilitating business operations.

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41. Mr Paul TSE requested the Administration to provide information on the experiences of the Mainland and India in the protection of personal data privacy to help assess the feasibility of implementing section 33 of PDPO.

42. On enhancing the powers of PCPD, USCMA advised that the Administration proposed to empower PCPD to provide legal assistance to an aggrieved data subject to institute legal proceedings to seek compensation

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under section 66 of PDPO, but did not propose to empower PCPD to impose monetary penalty on serious contravention of DPPs. The Administration, however, had proposed to make certain serious contravention, such as unauthorized sale of personal data, an offence. She added that it was uncommon for non-judicial body in Hong Kong to be given the power to impose monetary penalty.

43. On personal data security breach notification, USCMA advised that it was appropriate to start with a voluntary personal data security breach notification to avoid imposing onerous burden on data users. She informed members that under the guidelines issued in 2009 by the Office of the Government Chief Information Officer ("OGCIO") after its review on information security measures, it was made mandatory for government bureaux and departments to notify the Government Information Security Incident Response Office under OGCIO and PCPD, as well as the affected individuals as far as practicable of any leakage relating to personal data. PCPD had also promulgated the *Guidance on Data Breach Handling and the Giving of Breach Notification* in June 2010 to assist data users in handling data breaches and giving data breach notifications. The Administration would work with PCPD to promote the adoption of a voluntary privacy breach notification system by public bodies and private organizations, and review the arrangements having regard to actual operational experience if necessary.

44. At this juncture, the Chairman proposed that the duration of the meeting be extended for about 20 minutes in order to allow adequate time for the Administration to respond to the views of members and deputations. Members raised no objection to the proposal.

45. Regarding sensitive personal data, USCMA said that as there were diverse views on the coverage of and regulatory model for sensitive personal data received during the public consultation exercise, the Administration did not intend to introduce a more stringent regulatory regime for sensitive personal data at this stage. The Administration would work with the Office of PCPD to step up promotion and education to promote best practices on the handling and use of sensitive data in general.

46. On commencement of the operation of section 33 of PDPO, USCMA advised that it would have significant implications on data transfer activities of various sectors such as the banking and telecommunications sectors. The Administration needed to consult stakeholders to assess the readiness of

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the community for the operation of section 33, and take into account international developments and assistance required by the industry. Moreover, as a data user could transfer personal data under section 33 to places with legislation substantially similar to, or served the same purposes as, PDPO, PCPD would need time to specify such places before the provision could come into operation.

Way forward

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47. The Chairman requested the Administration to provide a written response to the various issues raised at the meeting for the Panel's continued discussion at the next regular meeting scheduled for 20 December 2010.

The Clerk

The Chairman also requested the Clerk to prepare a paper summarizing the major issues raised to facilitate the discussion. The Chairman also invited PCPD to join the discussion.

II. Any other business

48. The Chairman informed members that Dr PAN Pey-chyou had given notification to withdraw his membership on the Panel with immediate effect.

49. The meeting ended at 12:22 pm.

Council Business Division 2
Legislative Council Secretariat
20 January 2012