

立法會
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(These minutes have been seen
by the Administration)

Panel on Constitutional Affairs

Minutes of meeting
held on Monday, 18 October 2010, at 2:30 pm
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)
Hon Albert HO Chun-yan
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Dr Hon Margaret NG
Hon CHEUNG Man-kwong
Dr Hon Philip WONG Yu-hong, GBS
Hon LAU Kong-wah, JP
Hon LAU Wong-fat, GBM, GBS, JP
Hon Miriam LAU Kin-yeet, 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 LEE Wing-tat
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon CHEUNG Hok-ming, GBS, JP
Hon WONG Ting-kwong, BBS, JP
Hon Ronny TONG Ka-wah, SC
Hon CHIM Pui-chung
Prof Hon Patrick LAU Sau-shing, SBS, JP
Hon Cyd HO Sau-lan
Hon CHAN Kin-por, JP
Dr Hon Priscilla LEUNG Mei-fun
Hon IP Kwok-him, GBS, JP
Hon Mrs Regina IP LAU Suk-yeet, GBS, JP
Dr Hon PAN Pey-chyau
Hon Paul TSE Wai-chun
Dr Hon Samson TAM Wai-ho, JP
Hon Tanya CHAN
Hon WONG Yuk-man

Members absent : Hon WONG Yung-kan, SBS, JP
Hon Timothy FOK Tsun-ting, GBS, JP
Dr Hon LAM Tai-fai, BBS, JP
Hon WONG Kwok-kin, BBS
Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung

Public Officers attending : Item II

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

Mr Joshua LAW Chi-kong
Permanent 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

Mr Howard CHAN Wai-kee
Deputy Secretary for Constitutional and Mainland Affairs

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

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

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I. Items for discussion at the next meeting
[Appendices II and III to LC Paper No. CB(2)8/10-11]

Members agreed to discuss at the next regular meeting to be held on 15 November 2010 the following items proposed by the Secretary for Constitutional and Mainland Affairs ("SCMA") -

- (a) Briefing by the New Privacy Commissioner for Personal Data ("the Privacy Commissioner"); and
- (b) Proposed creation of one supernumerary post of Principal Executive Officer in the Registration and Electoral Office ("REO").

2. Referring to her letter dated 5 October 2010 to the Chairman of the Panel, Ms Emily LAU proposed that the Panel should discuss the outcome of the investigation into the omissions of Mr LAU Wong-fat to register certain interests in his capacity as an Executive Council ("ExCo") Member. She expressed dissatisfaction that while the case was still under review, the Administration had already proposed to revise the guidelines for declaration of registrable interests of ExCo Members. Ms LAU requested the Administration to investigate the case and provide the Panel with a comprehensive report on the account of the case and the outcome of the investigation. She further requested the Administration to explain to the Panel its proposed revision to be made to the relevant guidelines and the reasons for making such revision.

3. The Chairman said that a Panel normally should monitor and examine policy matters but not individual case. He asked the Administration whether an investigation had been conducted into the case and, if yes, whether the outcome could be reported to the Panel. SCMA responded that the Chief Executive's Office ("the CE's Office") was reviewing the case and he would convey Ms LAU's request for information on the outcome of the review on the case of Mr LAU Wong-fat to the CE's Office. He undertook

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to provide a paper on the existing declaration mechanism by ExCo Members and any proposed revision for members' discussion at the next regular meeting in November 2010. Members agreed. Ms Emily LAU suggested that representatives of the CE's Office should also be invited to join the discussion of the relevant item.

II. Briefing on the Chief Executive's Policy Address 2010-2011

[LC Paper No. CB(2)37/10-11(01), The 2010-2011 Policy Address – "Sharing Prosperity for a Caring Society" and The 2010-2011 Policy Agenda booklet]

4. SCMA briefed members on the initiatives of the Constitutional and Mainland Affairs Bureau ("CMAB") set out in the 2010-2011 Policy Agenda.

(Post-meeting note: The speaking note of SCMA was issued to members vide LC Paper No. CB(2)102/10-11(02) on 20 October 2010.)

Constitutional Development

5. Mr WONG Yuk-man said that the League of Social Democrats ("LSD") expressed strong disagreement that "Hong Kong had taken a critical step forward in its constitutional development" as described in the paragraph 152 of the Policy Address. He considered that the passage of the two motions to amend the method for selecting CE and for forming the Legislative Council ("LegCo") in 2012 ("the two electoral methods for 2012") meant that constitutional development in the coming ten years would stagnate. Mr WONG said that the "one-person-two-votes" model proposed by the Democratic Party for returning the five new District Council Functional Constituency ("DC FC") seats in 2012 only had the effect of endorsing an election with a screening mechanism and in favour of the privileged class. He stressed that simple increase of elected seats would not bring about democracy as the split voting system and the ratio for Members returned by FCs and Members returned by geographical constituencies ("GCs") through direct elections would remain unchanged. Mr WONG expressed strong discontent that the existing political system had only safeguarded the interests of the privileged class and had disregarded the long-standing aspirations of the general public for democracy.

6. Ms Emily LAU said that the Democratic Party supported the package of proposals put forth by the Government concerning the draft amendments to the two electoral methods in 2012, which had taken the constitutional

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development of Hong Kong a step forward. She hoped that the Administration would expedite its work on local legislation and work out the proposal for returning the new DC FC seats as soon as possible. Ms LAU asked whether the current-term Government of Hong Kong Special Administrative Region ("HKSAR") would consider enacting legislation in one-go for the implementation of universal suffrage for selecting CE in 2017 and for forming LegCo in 2020. She was given to understand that the Liaison Office of the Central People's Government ("CPG") in HKSAR was considering that possibility.

7. SCMA responded that the "one-person-two-votes" model for returning the five new DC FC seats in 2012 would bring about a real advancement in the constitutional development of Hong Kong. The current-term Government had successfully secured the universal suffrage timetable for electing CE and for forming of LegCo in 2017 and 2020 respectively. The Administration had consolidated the views relating to universal suffrage received during the public consultation on the two electoral methods for 2012. It would be appropriate for the next-term Government to follow up on the relevant proposals for the implementation of universal suffrage.

8. Dr Priscilla LEUNG indicated her support to the "one-person-two-votes" model for returning the five new DC FC seats in 2012. Mr IP Kwok-him said that there was no doubt that the passage of the two motions to amend the two electoral methods for 2012 represented a significant step forward in the constitutional development of Hong Kong. Pointing out the need to make arrangements soon for holding the various elections, Mr IP enquired about the legislative timetable regarding the two electoral methods for 2012. He further sought clarification as to whether the Liaison Office of CPG in HKSAR had been studying the issue of enacting legislation in one-go for the implementation of universal suffrage.

9. SCMA reiterated that the Administration would consult the Panel on the major legislative proposals regarding the two electoral methods for 2012 by the end of October 2010. The Administration planned to introduce into LegCo the CE election (Amendment) Bill and the LegCo (Amendment) Bill by the fourth quarter of 2010. Subject to the passage of the two Bills by LegCo and the making of the relevant subsidiary legislation, the Administration would commence arrangements for the Election Committee subsector elections, the CE election and the LegCo election to be held in December 2011, March 2012 and September 2012 respectively. As regards the timetable for implementing universal suffrage, SCMA reiterated that the current-term Government had successfully secured the timetable for electing

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CE and for forming of LegCo in 2017 and 2020 by universal suffrage respectively. It would be for the fourth-term CE and the fifth LegCo to address together the issues relating to the implementation of universal suffrage for the selection of CE in 2017, and for the CE returned by universal suffrage in 2017 to work with the sixth LegCo to deal with the issues relating to the implementation of universal suffrage for the formation of LegCo in 2020. The current-term Government had not received further authorization to handle these issues.

10. Ms Audrey EU expressed dissatisfaction with the "one-person-two-votes" model for returning the five new DC FC seats in 2012, pointing out that the weight for each vote among different sectors under such model would not be equal, there would be inequality among the right to vote, the right to nominate and the right to stand for election, and the election would remain a form of indirect election. Referring to the CE's remark that the Administration would shift its focus to improving people's livelihood from the issue of constitutional development, she opined that the Administration was sending a misleading message to the public that constitutional development and people's livelihood were two separate issues. In her view, these two issues were interrelated.

11. Dr Margaret NG asked what technical amendments relating to traditional FCs would be introduced, and whether and when the electorate base of traditional FCs would be broadened.

12. SCMA explained that in line with the established practice, some technical adjustments such as updating the registration of electors would be made to the electorate of FCs to reflect the latest circumstances in the relevant constituencies prior to any general election. These technical amendments such as updating of the registered voters would be made to traditional FCs and EC subsectors as a regular exercise carried out once every few years. He added that there was a general consensus that there should be no substantial change for the traditional FCs. The most substantial change to FCs for forming LegCo in 2012 to be introduced by the current-term Government would be the addition of the five new FC seats to be returned by way of the "one-person-two-votes" model.

Proposed restrictions on LegCo Members who resign from their office to stand again in the by-elections

13. Dr Priscilla LEUNG said that she had put forth a draft Private Member's Bill proposing that LegCo Members in office who resigned at will

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would not be able to stand for the subsequent by-elections within the same term. She did not agree with the Administration's view that the draft Bill related to public expenditure or political structure and therefore could not be introduced by a LegCo Member according to Article 74 of the Basic Law ("BL"). She, however, envisaged that the draft Bill would stand little chance of being passed by LegCo if introduced. Dr LEUNG pointed out that there were other suggestions in the community such as the vacancy should be filled automatically by the candidates who obtained the second highest number of votes in the respective list and the direct substitution practice adopted in the National People's Congress election. Considering that the right to stand for election as guaranteed under BL 26 was not absolute, she urged the Administration to look earnestly into the suggestions and put forth its proposal to amend the LegCo Ordinance (Cap. 542) ("LCO") so as to impose restrictions on the eligibility of a Member who resigned in order to stand for election in the by-election to fill that vacancy.

14. SCMA responded that the Administration observed that members of the public expected the LegCo Members they voted for would complete their four-year term of office to serve the community and did not support the so-called "referendum campaign" brought about by the resignation of the five GC Members in January 2010 which triggered the need to hold a by-election. However, any proposal to amend LCO must comply with BL and the proposed restrictions should be practicable. SCMA pointed out that it would not be effective to simply prevent the Member who had resigned from standing for in the by-election to fill that vacancy if a party colleague of that Member could still stand for that by-election. He assured Dr LEUNG that the Administration had been studying the issue and the study was almost completed. A proposal would be put forward in a few months' time for consultation with the Panel.

15. Referring to the discussion on the restrictions to be imposed on LegCo Members who resigned from their office to stand in the by-elections, Ms Audrey EU opined that the overriding principle was that the Administration must ensure that the right to vote and the right to stand for election as guaranteed under BL would not be compromised.

"Revolving Door" arrangement under the Political Appointment System ("PAS") for civil servants

16. Mr WONG Yuk-man expressed dissatisfaction that while the Administration had made clear that there should be no "revolving door" for serving civil servants taking up political positions when PAS was further

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expanded in 2007, CE was proposing such an arrangement in his 2010-2011 Policy Address. In his view, PAS which was filled with drawbacks was a total failure and implementing a "revolving door" arrangement under PAS for civil servants who had taken up political positions to return to the Government was unacceptable.

17. SCMA responded that the Administration's position that there should be no "revolving door" arrangement under PAS to allow civil servants who had taken up political positions to return to the Government after they stepped down from office remained unchanged.

18. Mr CHEUNG Man-kwong said that while CE had clearly indicated in his Policy Address the need to consider more flexible arrangement such as a "revolving door" to attract more people from different sectors to take up political appointments (paragraph 155 of the Policy Address), both the Secretary for the Civil Service during her briefing on the policy initiatives of the Civil Service Bureau featuring in the 2010-2011 Policy Address held in that morning and SCMA had stressed that there was no "revolving door" arrangement under the current civil service system and hence former civil servants serving as politically-appointed officials could not return to the Government after stepping down the office. He considered that since there had already been a "revolving door" arrangement for former politically-appointed officials to return to the academic and business sectors, the "revolving door" arrangement proposed in the Policy Address, in his view, must be intended for civil servants. He queried why there was such a discrepancy. Dr Margaret NG shared the view saying that the Administration should give a clear explanation on the matter.

19. SCMA reiterated that the current-term Government would not implement a "revolving door" arrangement under PAS for civil servants so as to maintain the long-standing core value of political neutrality of the civil service. If there were any policy change regarding the "revolving door" arrangement, that would be a matter for the next-term Government. The Administration at this stage, however, would consider the "revolving door" arrangement from a macro perspective with reference to other similar initiatives such as the "revolving door" system in US which provided entry and exits for political talents to take up positions in think-tanks/policy research institutions and the government.

20. Ms Emily LAU expressed support for the policy of not introducing a "revolving door" arrangement under PAS for civil servants. In her view, the proper way to groom political talents should be through development of

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political parties and constitutional development. She enquired about the Administration's plan to enhance the development of political parties. Ms Audrey EU echoed the opposition to a "revolving door" arrangement under PAS for civil servants.

21. SCMA responded that the Administration agreed that the development of political parties and the grooming of political talents could be enhanced through constitutional development. In this regard, the number of DC and LegCo seats in 2011 and 2012 would be increased through local legislation to provide more room for participation in elections by political talents. It was already possible for members of political parties to join the Government under PAS and to become ExCo Members. If necessary, a political alliance could be formed by CE within the framework of BL.

22. Mr IP Kwok-him considered that introducing a "revolving door" arrangement would help nurture political talents. Pointing out that such an arrangement was common place and had been functioning well in the academic and business sectors in overseas countries, he asked whether the current-term Government would review the "revolving door" arrangement and reach some conclusive views for the next-term Government to follow up. SCMA reiterated that the current-term Government would conduct an internal review on the "revolving door" arrangement in a broad sense. It would be more appropriate for the next-term Government to further study the issue to see if a more flexible "revolving door" arrangement was necessary to attract people from different sectors to take up political appointments.

23. Noting that the majority of the general public was opposed to the implementation of PAS, Mr Ronny TONG asked the Administration to justify its decision to continue with the system. He further asked whether the Administration would consider enhancing the transparency of the political appointment process and making public the selection criteria, if PAS was to continue.

24. SCMA said that it was the objective of the current-term Government to maintain the existing PAS and there was no plan to make substantial change to the system. There were currently 40 political appointment positions under PAS. The Administration would continue to fill the vacant positions of Under Secretaries and Political Assistants if there were suitable candidates. It was the Administration's position that all political appointments were made under the principle of meritocracy having regard to the experience of the candidates and requirements of the positions concerned.

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Post-office employment control for politically appointed officials and civil servants

25. Ms Cyd HO was of the view that while the existing post-office employment control of directorate civil servants had all along been unsatisfactory, the post-office employment control of politically appointed officials was far more inadequate. She considered that as politically appointed officials had greater influence on policy formulation and possessed far more information on future government initiatives than directorate civil servants, control over their post-office employment should be further strengthened and made more stringent. Referring to some instances where former Principal Officials ("POs") took up positions in the business sector after leaving the office, Ms HO requested the Administration to explain how POs could be prevented from bestowing favours on private sector associates while in office and their use of privileged information to the advantage of their employers when they joined the private sector. She was concerned that there would be a greater risk of a potential conflict of interests arising from the post-office employment of POs if a "revolving door" arrangement was to be implemented. Ms Audrey EU shared a similar view saying that the control over post-office work for politically appointed officials should be further strengthened. She further enquired about the progress of the review on the post-office employment control of politically appointed officials recommended by the Committee on Review of Post-Service Outside Work for Directorate Civil Servants.

26. SCMA said that the issue of the post-office employment control for politically appointed officials had been deliberated at length in 2002 when the policy on PAS was formulated. Under the existing mechanism, within one year after stepping down from office, politically appointed officials would need to seek the advice of the Advisory Committee on Post-office Employment for Former CEs and Politically Appointed Officials, particularly on any potential conflict of interest issue, before commencing any employment within one year after stepping down from office. Imposing the one-year control period was to prevent politically appointed officials from making use of privileged information obtained during their employment in the Government after stepping down from office. SCMA pointed out that it was not unreasonable to impose different post-service/office employment control for directorate civil servants and politically appointed officials because the latter did not enjoy any security of tenure or any gratuity/retirement benefits. He maintained that the current control regime for post-office employment control of POs was effective.

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27. Mrs Regina IP was of the view that the existing mechanism was unfair given that the control period for a PO to commence any employment after stepping down from office was one year while that of directorate civil servants was five years. She stressed that there were greater risks of a conflict of interest when POs took up post-office employment in the private sector when compared with civil servants. She considered that the issue about possible conflict of interest needed to be addressed even though it would be difficult to control the post-employment activities of politically appointed officials who did not have pensions. Mrs IP further pointed out that some senior officials from the Hong Kong Monetary Authority ("HKMA") tasked to regulate banking activities had joined the private sector such as a commercial bank within a short time after leaving their office. She considered that it was a constitutional issue as the conflict of interests and the use of privileged information from the Government might occur in such cases which would seriously harm the interests of the Government. She called upon the Administration to look into the issue seriously and to plug the loophole. Dr Margaret NG agreed, considering that such cases would undermine public confidence on the operation of HKMA.

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28. SCMA replied that the Administration was mindful of the control over post-office work for directorate civil servants and politically appointed officials. Both civil servants and politically appointed officials had to observe their respective codes of practices under the existing mechanism. He undertook to relay members' views concerning HKMA to the Financial Secretary's Office.

DC Appointment System

29. Mr WONG Yuk-man expressed dissatisfaction that the Administration failed to provide a timetable for the abolition of the DC appointment system. Pointing out that the Democratic Party attached great importance to the issue, Ms Emily LAU urged the Administration to abolish forthright the DC appointment system. Ms Audrey EU shared a similar view. She said that it was the Civic Party's view that the DC appointment system should be abolished in 2011 at the latest.

30. SCMA replied that the Administration would separately put forth proposals concerning the abolition of the DC appointment system for consultation with LegCo and the public in due course. He assured members that it was the plan of the Administration to abolish the DC appointment system.

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31. Mrs Regina IP said that the Administration should expedite the legislative process on the abolition of DC appointed seats to facilitate preparations by potential candidates including appointed DC members who would like to participate in the coming DC election.

32. SCMA replied that the Administration had made the District Councils Ordinance (Amendment of Schedule 3) Order 2010 to add seven elected seats to the Fourth-Term DC by increasing the existing 405 seats to 412 seats. Subject to the approval of LegCo, the Administration would proceed with the demarcation of constituency boundaries for the DC election to facilitate preparations by candidates. He reiterated that the Administration would submit the legislative proposal for the abolition of the DC appointment system after legislating on the two electoral methods for 2012 and the DC elected seats for the Fourth-term DC.

Promotion of racial equality

33. Noting that the operation of the four support service centres for ethnic minorities originally monitored by CMAB would be placed under the purview of the Home Affairs Bureau, Mr CHEUNG Man-kwong expressed concern about the co-ordination of the services provided for ethnic minorities. Pointing out that the policy formulation and provision of relevant services straddled various policy areas including education, labour, health and welfare, Mr CHEUNG asked which policy bureau was accountable for the overall provision of such services. He further sought elaboration on the division of work among concerned Government bureaux and departments in implementation of policies and provision of support services concerning the ethnic minorities.

34. SCMA responded that CMAB was responsible for the overall policy on racial equality, the Race Discrimination Ordinance (Cap. 602) and co-ordination of the Government's efforts in this respect. As the Home Affairs Bureau would step up and co-ordinate similar support services for new arrivals, it was considered more appropriate for that Bureau to oversee the operation of the four support service centres for ethnic minorities to facilitate better co-ordination of support services at the community level. CMAB would continue to be responsible for the overall policy on racial equality. At Mr CHEUNG Man-kwong's request, SCMA undertook to provide a paper on the division of work among Government bureaux and departments in the implementation of policies and provision of support services concerning ethnic minorities.

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35. Dr Margaret NG asked whether the Administration would consider relaxing the Chinese language requirement for candidates of ethnic minorities when they applied for police constable positions so that their application would not be turned down simply due to the language problem. SCMA replied that it was an established requirement that applicants for police constable positions must meet the basic language requirements in both Chinese and English. He informed members that the Police had been recruiting ethnic minorities to undertake liaison work at the community level. He would relay the concern to the Police and the Security Bureau for consideration.

Strengthening integrity-building efforts for tertiary students

36. Ms Cyd HO expressed objection to the new initiative of launching an association for "ICAC Ambassadors" recruited from tertiary education institutions (page 88 of the Policy Agenda 2010-2011) saying that tertiary students were mature enough to form their own association if they wished. In response to her enquiry, SCMA confirmed that the initiative was not undertaken by CMAB. He undertook to revert to Ms HO on the responsible Government bureau.

III. Report on Public Consultation on Review of the Personal Data (Privacy) Ordinance

[LC Paper No. CB(2)37/10-11(02) to (03)]

Briefing by the Administration

37. SCMA said that the Government attached great importance to the protection of personal data privacy. The Personal Data (Privacy) Ordinance ("PD(P)O"), which was enacted in 1995, required updating in order to afford adequate protection to personal data privacy having regard to technological and other developments over the last decade as well as mounting public concern about personal data protection. With the support of the Office of the Privacy Commissioner for Personal Data ("PCPD"), the Administration had conducted a review on PD(P)O. After a public consultation exercise in 2009, the Administration had analysed the views received and put forward various legislative proposals in the Report on Public Consultation on Review of the Personal Data (Privacy) Ordinance ("the Consultation Report"). As these proposals were very important which would impact on the lives of the general public and business operations, the Administration would launch further public discussion until 31 December 2010.

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38. USCMA then gave a power-point presentation to members on the result of the public consultation on the review of PD(P)O and the legislative proposals drawn up in the light of the views received during the public consultation as set out in the Administration's paper tabled at the meeting [LC Paper No. CB(2)101/10-11(01)].

39. Members noted that the LegCo Secretariat had prepared a background brief on review of PD(P)O for members' reference [LC Paper No. CB(2)37/10-11(03)]

Investigation into the Octopus Rewards Programme and other investigation work of PCPD

40. Referring to the PCPD's investigation into the collection and use of customers' personal data under the Octopus Rewards Program run by Octopus Rewards Limited ("ORL"), a company wholly owned by Octopus Holdings Limited ("OHL") ("the Octopus incident"), Mr WONG Yuk-man asked whether the investigation report would be made public and whether OHL would be penalized for non-compliance with PD(P)O.

41. SCMA said that OHL had responded to the investigation report published by PCPD and undertook to take measures to comply with the requirements under PD(P)O. The legislative proposals put forth by the Administration were drawn up in the light of the public views, the practices of some enterprises to transfer customer personal data for direct marketing purposes without the consent of the customers and the Octopus incident. The Chairman advised members that it would be more appropriate for the Panel on Financial Affairs to continue its follow-up on the Octopus incident in detail, if necessary.

42. Mr PAN Pey-chyou said that he had recently received a complaint in which the complainant was refused access to his travel record on his Octopus Card during a dispute with staff of Mass Transit Railway ("MTR"). Although MTR admitted that its staff had mishandled the case, no explanation was provided as to why access to the Octopus Card records by the clients themselves would be denied. He enquired whether amendments would be made to PD(P)O to enable data subjects to access their personal data collected by enterprises including electronic records and about the circumstances under which data subjects could make such requests.

43. SCMA said that the main objectives of the review of PD(P)O were to strengthen the protection of personal data by introducing new requirements

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and offences and imposing heavier penalty for non-compliance with PD(P)O. As the case was related to the daily operation of OHL concerning handling of customers' requests, he would refer the case to the Transport and Housing Bureau for follow-up.

44. Ms Emily LAU enquired whether PCPD was conducting investigations regarding the collection and sale of customers' personal data by some banks and telecommunication companies and, if yes, whether the reports would be released. SCMA confirmed that PCPD was conducting these investigations and would decide in accordance with its statutory powers as to whether the reports should be released. He added that PCPD would normally release its investigation reports if significant public interest was involved.

Powers of PCPD

45. Mr Ronny TONG considered that the crux of the problem under the existing PD(P)O was that breaches of Data Protection Principles ("DPPs") were not criminal offences. PCPD could only serve an enforcement notice ("EN") on a data user in case of non-compliance with a DDP under PD(P)O and it was only upon the issuance of an EN and the failure to comply with the directions in the EN that an offence would be committed. He was concerned that some media organizations which had contravened DDPs under PD(P)O did not need to bear any legal consequences provided that they had subsequently complied with the EN. Mr TONG queried why the Administration did not consult the public on the proposal of making contravention of DDPs a criminal offence to forestall deliberate circumvention of the regulatory regime. Mr WONG Yuk-man also asked whether any proposals put forward by the Administration could plug the loophole.

46. SCMA said that the public were welcome to give their views on the proposals set out in the Consultation Report. The Administration proposed to make repeated contraventions of a DPP on same facts a criminal offence. The Administration also proposed in the Consultation Report that PCPD should be conferred the power to provide legal assistance to an aggrieved data subject who intended to institute legal proceedings against a data user to seek compensation under section 66 of PD(P)O. USCMA added that the compensation sought could be in relation to a breach of DDPs by the data user.

47. Referring to the investigation report on the Octopus incident, Mr WONG Kwok-hing pointed out that the Privacy Commissioner had not

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issued any EN in the Octopus incident because ORL had taken remedial action for compliance with the requirements under PD(P)O. He considered that PD(P)O had not afforded adequate powers to PCPD making it a "toothless tiger". Mr WONG stressed that the Octopus incident demonstrated that there was a strong need to review the existing PD(P)O to plug the loopholes.

48. SCMA responded that the Administration had set out clearly in the Consultation Report some legislative proposals for the purpose of enhancing protection of personal data such as making the sale of personal data by a data user without the data subject's consent a criminal offence. It was also proposed in the Consultation Report that PCPD should issue a Code of Practice to provide guidance as appropriate on the new requirements to be imposed under PD(P)O.

49. Ms Emily LAU asked why the proposal to confer on PCPD the power to carry out criminal investigations and prosecutions was not taken forward by the Administration. SCMA explained that under the existing arrangements, the powers to enforce PD(P)O, conduct criminal investigation and prosecute were vested with PCPD, the Police and the Department of Justice respectively. The Administration considered that it was appropriate to have separate organizations to handle complaints, criminal investigations and prosecutions to ensure checks and balances, and such arrangements had been working smoothly.

Collection, use and sale of personal data

50. Referring to the case where a former Taxation Officer of the Inland Revenue Department who had recorded the personal particulars of 18 300 taxpayers for his future personal use was acquitted from the charge of misconduct in public office because the prosecution could not prove that his collection of taxpayers' personal data was intended for profits or malicious use, Mr WONG Yuk-man informed members that that former Taxation Officer was subsequently fined \$3,000 upon the appeal by the prosecution. The court held the view that it was a serious crime for unauthorized collection of personal data even though the data had not been used. Mr WONG asked whether the legislative proposals put forward by the Administration would plug the loophole to the effect that such act would be made a criminal offence without the need to prove an intent for profits or malicious use.

51. SCMA responded that some new proposals in the Consultation Report could address the concern because it was proposed that a data user must act

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in accordance with the authorization given by the data subjects for any collection, use or sale of their personal data, otherwise the data user would be subject to criminal sanctions.

52. Ms Audrey EU stressed that the intrusion of privacy was a serious matter and any resulting harm might not be remediable. She therefore considered that any serious contravention of PD(P)O should be made a criminal offence subject to immediate prosecution in order to enhance deterrent effect. In this connection, Ms EU queried why the Administration proposed that non-compliance with any of the additional specific requirements on data users who intended to use (including transfer) the personal data collected for direct marketing purposes in paragraph 8(a) to (c) of the Administration's paper would be subject to the issuance of an EN by PCPD only. She added that the same query applied to the unauthorized sale of personal data by data user.

53. USCMA explained that a two-step approach would be adopted to regulate collection and use of personal data for direct marketing purposes as well as unauthorized sale of personal data by a data user. While non-compliance with any of the additional specific requirements for collection and use of personal data in direct marketing would be subject to issuance of an EN, it would be a criminal offence if a data user did not comply with such requirements and subsequently used the personal data for direct marketing purposes. Similarly, non-compliance with any of the new requirements for sale of personal data by a data user would be subject to issuance of an EN. It would be a criminal offence if the new requirements were not complied with and there was subsequent sale of personal data to another person by a data user for a monetary or in kind gain or against the wish of the data subject. At the suggestion of the Chairman, SCMA undertook that the Administration would set out this two-step approach clearly in a future discussion paper to facilitate understanding by members.

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54. Regarding the unauthorized sale of personal data by a data user, Mr CHAN Kin-por opined that that Administration should differentiate between sale of personal data by enterprises to others for direct marketing and collection of personal data for its own direct marketing purpose. The meaning of "sale" should also be clearly defined. He stressed that the Administration must strike a right balance during the regulatory process. While the Administration should combat unauthorized use of personal data for monetary gains, it should be mindful of the fact that it was a common business practice for enterprises such as the insurance companies and telecommunication companies to collect the personal data of their clients for

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its own direct marketing activity. Mr CHAN considered that such a practice was widely accepted by the public provided that the personal data would be destroyed after use. He also suggested that for administrative convenience, a data user should be allowed to seek the consent of the data subject on the collection of personal data and the sale of personal data to third party for monetary gains in tandem with the use of a single consent form.

55. SCMA assured members that any regulatory measures over the collection and use of personal data in direct marketing would carry sufficient clarity to facilitate compliance by the industries concerned. The principle was that even though personal data was collected with the prescribed consent of the data subject, the data user could not use such personal data for purposes beyond the original purpose of collection of the personal data. He added that the Administration was open-minded on the design of the consent form for collection of personal data as long as the specific requirements under PD(P)O were complied with.

56. Ms Audrey EU opined that the "opt-in" model should be adopted to ensure that a data user had obtained the explicit consent of the data subject before the sale of personal data for monetary gains.

57. Pointing out that the "opt-out" model was commonly adopted in overseas countries, Mr CHAN Kin-por opined that the Administration should discuss in-depth with relevant organizations and stakeholders such as direct marketing companies in taking the way forward to strike a balance between safeguarding the personal data privacy and the interests of business sector.

58. SCMA said that an "opt-out" model was prescribed in the Unsolicited Electronic Messages Ordinance (Cap. 593) as it was considered more practicable for implementation as far as the industry was concerned. He assured members that the Administration would carefully consider the views of the public and stakeholders before finalizing the relevant legislative proposal.

Data security and protection of privacy on the Internet

59. Ms Cyd HO was of the view that given the frequent cross-border dataflow practices in business operations between Hong Kong and Shenzhen or other nearby regions, transfer of personal data outside Hong Kong within the same group of companies should also be regulated even though the transfer was not for monetary gains. SCMA advised that the Administration proposed to require data users to use contractual or other means to ensure

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that its data processors and sub-contractors, whether within Hong Kong or offshore, would comply with the requirements under PD(P)O when contracting out the processing of personal data.

60. Referring to the Yahoo case in which the IP address of a journalist was disclosed by "Yahoo! Holdings (Hong Kong) Limited" leading to his arrest and conviction of crime of illegally providing state secrets to foreign entities, Ms Cyd HO cautioned that the Administration should step up protection of personal data on the Internet to prevent intrusion of privacy. She considered that the Administration should review the definition of "personal data" in light of the development of technology. Expressing grave concern on the intrusion of privacy by Internet software such as the unsolicited installation of cookies, she enquired whether any measures would be taken to address such issue.

61. USCMA explained that in accordance with the definition under PD(P)O, personal data referred to any data relating directly or indirectly to a living individual from which it was practicable to ascertain the identity of the individual and which were in a form in which access or processing was practicable. The Administration held the view that the IP address per se should not amount to personal data within the definition of PD(P)O. This view was shared by the general public as indicated by the views received during the public consultation. Regarding the data protection on the Internet, USCMA explained that if the cookies satisfied the requirements of identifiability, they would fall under the scope of personal data under PD(P)O and be subjected to regulation. She informed the Panel that the Privacy Commissioner was conducting investigation to see if the setting of cookies on the websites of some banks was in compliance with the requirements of PD(P)O.

Provision of assistance to data subjects

62. Mr Ronny TONG sought confirmation from the Administration whether the Privacy Commissioner could provide legal assistance to a data subject to seek compensation where the data user had violated the requirements under PD(P)O for the first time. SCMA replied that if the legislative proposal of granting PCPD the power to provide legal assistance was implemented, data subjects might seek legal assistance to institute legal proceedings against data users to seek compensation when their privacy were infringed by the data users. The arrangements could enhance deterrent effect.

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63. Ms Audrey EU asked whether mediation or conciliation service would also be provided by PCPD to an aggrieved data subject. SCMA said that PCPD would consider providing such services as other forms of assistance to solve the disputes between data users and data subjects.

64. Ms Emily LAU enquired if additional resources would be allocated to PCPD to provide legal assistance to data subjects. SCMA responded in the affirmative. He added that since the transfer of policy area of personal data protection to CMAB from mid-2007, CMAB had increased the annual financial provision to PCPD from \$36 million to over \$48 million, representing a substantial increase of over 30%. Ms LAU opined that more resources should be allocated to PCPD in view of its increasing workload. SCMA assured members that CMAB would strive to provide PCPD with adequate resources for the effective implementation of PD(P)O.

Application of PD(P)O to offices set up by CPG

65. Ms Emily LAU expressed dissatisfaction that after over ten years since the establishment of HKSAR, the Administration was unable to tell unequivocally whether PD(P)O applied to the CPG offices in the territory. She opined that PD(P)O should be applicable to such offices which might have been secretly collecting personal data of the public. Ms LAU urged the Administration to expedite its liaison with CPG.

66. SCMA responded that CPG offices in HKSAR had the duty to comply with the provisions of BL. Since the passage of the Adaptation of Laws Ordinance in April 2009, the application of four more Ordinances had been extended to CPG offices in HKSAR. The Administration was working on the extension of the applicability of other Ordinances to CPG offices and would continue with its best effort in this aspect.

Way forward

67. In response to Mr WONG Kwok-hing's enquiry about the timetable for the Administration to introduce the legislative proposals, SCMA said that the Administration planned to invite the public and stakeholders to further discuss the legislative proposals for a period of about two months till the end of December 2010. Subject to the views of the public and political parties, the Administration aimed at finalizing the legislative proposals and put forward the proposals by the end of the 2010-2011 legislative session.

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68. Mr WONG Kwok-hing expressed concern about the protection of personal data before implementation of the new legislative proposals. SCMA explained that the Privacy Commissioner had recently issued a Guidance Note on the Collection and Use of Personal Data in Direct Marketing to give general guidance to data users who collected and used personal data for direct marketing activities. The Privacy Commissioner would consider whether an EN should be issued for non-compliance with the Guidance Note.

69. The Chairman suggested and members agreed that a special meeting will be held on 20 November 2010 tentatively from 9:00 am to 1:00 pm to receive public views on the Consultation Report. The Chairman also suggested that the Panel could further discuss the Consultation Report at its regular meeting in December 2010. Mr Audrey EU remarked that the Privacy Commissioner should be invited to the special meeting.

70. There being no other business, the meeting ended at 5:00 pm.

Council Business Division 2
Legislative Council Secretariat
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