

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 December 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
Hon LAU Kong-wah, JP
Hon Emily LAU Wai-hing, 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 WONG Ting-kwong, BBS, JP
Hon Ronny TONG Ka-wah, SC
Hon CHIM Pui-chung
Hon Cyd HO Sau-lan
Dr Hon LAM Tai-fai, BBS, JP
Hon CHAN Kin-por, JP
Dr Hon Priscilla LEUNG Mei-fun
Hon WONG Kwok-kin, BBS
Hon IP Kwok-him, GBS, JP
Hon Mrs Regina IP LAU Suk-ye, 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 Tanya CHAN
- Member attending** : Hon LEE Cheuk-yan

Members absent : Dr Hon Philip WONG Yu-hong, GBS
Hon WONG Yung-kan, SBS, JP
Hon LAU Wong-fat, GBM, GBS, JP
Hon Miriam LAU Kin-yea, GBS, JP
Hon Timothy FOK Tsun-ting, GBS, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon CHEUNG Hok-ming, GBS, JP
Prof Hon Patrick LAU Sau-shing, SBS, JP
Hon WONG Yuk-man

Public Officers attending : Item III

The Administration

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

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

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

Miss Vinci CHAN
Acting 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

Item IV

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

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

Mr Hubert LAW Hin-cheung
Principal Assistant Secretary for Constitutional and
Mainland Affairs

Ms Roxana CHENG Pui-lan
Acting Deputy Solicitor General (Constitutional)
Department of Justice

Ms LEE Sau-kong
Senior Assistant Solicitor General
Department of Justice

Mrs Anissa WONG LIU Siu-yung
Senior Education Officer (Education Commission)
Education Bureau

Mr CHENG Man-leung
Senior Curriculum Development Officer (Chinese)³
Education Bureau

Mr Chris SUN Yuk-han
Principal Assistant Secretary for Food & Health (Health)³

Mrs Alice LO CHAN May-yee
Chief Housing Manager (Applications)
Housing Department

Mr FONG Ngai
Assistant Commissioner
(Policy Support and Strategic Planning)
Labour Department

Mr Franco KWOK Wai-fan
Principal Assistant Secretary for Labour & Welfare (Poverty)

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

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

Ms Clara TAM
Assistant Legal Adviser 9

Miss Ivy LEONG
Senior Council Secretary (2)4

Ms Wendy LO
Council Secretary (2)3

Mrs Fanny TSANG
Legislative Assistant (2)3

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I. Information papers issued since the last meeting
[LC Paper No. CB(2)476/10-11]

Members noted that the provisional recommendations of the Electoral Affairs Commission on the boundaries and names of the District Council constituency areas for the 2011 District Council Election had been issued since the last meeting.

II. Items for discussion at the next meeting
[LC Paper Nos. CB(2)582/10-11(01) to (02)]

2. Members agreed to discuss at the next regular meeting to be held on 17 January 2011 the following items proposed by the Secretary for Constitutional and Mainland Affairs ("SCMA") -

- (a) Election petition mechanism under the Legislative Council Ordinance (Cap. 542) and related issues; and
- (b) Review of practical electoral arrangements.

On the item referred to in paragraph 2(b) above, Ms Emily LAU asked whether lodging of candidates' election returns under Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) and matters relating to implementing environment protection measures in making electoral arrangements would be included in the Administration's paper for discussion at the next meeting. SCMA replied in the affirmative.

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III. Review of the Personal Data (Privacy) Ordinance and related matters

[LC Paper Nos. CB(2)37/10-11(02) to (03), CB(2)314/10-11(01), CB(2)582/10-11(03) to (06) and CB(2)596/10-11(01)]

Briefing by the Administration and the Privacy Commissioner for Personal Data ("PCPD")

3. SCMA briefed members on the major proposals set out in the Report on Public Consultation on Review of the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO") ("the Consultation Report"), the Administration's responses to the questions and views raised on those proposals as well as the information on the related matters as set out in the Administration's paper [LC Paper No. CB(2)582/10-11(03)].

4. PCPD briefed members on the overseas regulatory regime on direct marketing and the sanctioning powers of overseas Privacy Commissioners or Data Protection Authorities as detailed in his papers [LC Paper Nos. CB(2)582/10-11(04) and CB(2)596/10-11(01)].

5. Members noted that the Legislative Council ("LegCo") Secretariat had prepared for members' reference a summary of major issues raised at the special meeting held on 20 November 2010 and a summary of the views and suggestions of the deputations attending that special meeting [LC Paper Nos. CB(2)582/10-11(05) to (06)].

Discussion

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

6. Mr WONG Ting-kwong indicated support for the proposals put forth by the Administration in the Consultation Report. He said that while he personally was supportive of adopting an "opt-in" mechanism for direct marketing activities which was not adopted under the Unsolicited Electronic Messages Ordinance (Cap. 593) ("UEMO"), the Democratic Alliance for the Betterment and Progress of Hong Kong ("DAB") considered that a mixed approach of "opt-in" and "opt-out" mechanisms should be adopted for direct marketing purpose to strike a balance between protecting personal data privacy and facilitating business operation of the direct marketing industry in Hong Kong. In brief, DAB proposed, at the initial stage, setting a transitional period during which an "opt-out" mechanism should be adopted

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for person-to-person telemarketing calls and a central "Do-not-call" register for person-to-person telemarketing calls should be set up. The Administration should review the effectiveness after one year of implementation and, if ineffective, could adopt an "opt-in" mechanism. DAB also proposed that explicit consent for collection and use of personal data should be sought in contracts between data subjects and data users to safeguard the personal data privacy of the public. To mitigate the potential impact on commercial operations, it was proposed that at an initial stage, an "opt-in" option for collection and use of personal data should be made available for consumers in any new contract so that their explicit consent would need to be sought while existing contracts would remain effective until they were replaced by new contracts. At the second stage, business contracts that did not provide an "opt-in" option for collection and use of personal data should be rescinded automatically.

7. Mr Jeffrey LAM urged the Administration to exercise caution in considering the regulatory regime for direct marketing purpose in order to strike a balance in protection of personal data privacy and the continued operation of the direct marketing industry. He enquired about overseas experiences and difficulties in implementing an "opt-in" mechanism for direct marketing activities and how the Administration would impose the proposed additional specific requirements on data users for the collection and use of personal data for direct marketing as detailed in paragraph 4 of the Administration's paper [LC Paper No. CB(2)582/10-11(03)]. In his view, the Administration should provide clear guidelines on the collection and use of personal data for direct marketing purpose to the industry concerned irrespective of the mechanism to be adopted.

8. SCMA responded that the Administration noted the diverse views on whether the "opt-in" or "opt-out" mechanism should be adopted for direct marketing activities. The Administration also appreciated that the direct marketing industry would need time to adapt to the enhanced regulation. The Administration would carefully consider the views of the community to 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.

9. PCPD advised that the right over the use of their personal data should be left to the data subjects. The adoption of an "opt-in" mechanism for direct marketing purpose could afford the best protection of personal data privacy of the public in that regard. Noting the concerns about the

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adoption of an "opt-in" mechanism, he suggested that interim arrangements, such as setting up a central "Do-not-call" register for person-to-person telemarketing calls, could be put in place at an initial stage to mitigate any potential impact on commercial operations. He added that central "Do-not-call" registers had already been set up in the United Kingdom, Australia, Canada, New Zealand, the United States and France to prohibit unsolicited telemarketing marketing activities through person-to-person telemarketing calls and/or other electronic communications means such as facsimile and pre-recorded messages. He could not see why it would be difficult to adopt a similar initiative in Hong Kong.

10. Mr WONG Kwok-hing concurred with the PCPD's view. He opined that as the Octopus incident had clearly reflected the lack of deterrent measures against unauthorized use of personal data for direct marketing under the current legislation, an "opt-in" mechanism should be introduced to require data users to seek explicit consent from data subjects on collection and use of their personal data for direct marketing purpose so as to plug the loophole. Enterprises which had collected consumers' personal data through bundled consent to the terms and conditions of the contract for goods or services should also be required to seek explicit consent from consumers again for further use of their personal data. He urged PCPD to provide more information on overseas experiences in implementing the "opt-in" mechanism for members' reference.

11. SCMA replied that in the light of the public concern over the Octopus incident, the Administration had proposed in the Consultation Report that data users should provide an option for data subjects not to agree to the use, including transfer, of their personal data for direct marketing purposes. He reiterated that the Administration would carefully examine the views received during the further public discussions before finalizing the legislative proposals.

12. In response to the enquiry of Mr WONG Kwok-hing on the Administration's views on a central "Do-not-call" register to deal with person-to-person telemarketing calls as proposed by PCPD, which he considered appropriate, SCMA said that the Office of the Telecommunications Authority (OFTA) maintained under UEMO "Do-not-call" registers on electronic communications including short messages and had developed a baseline code of practice for person-to-person telemarketing calls for adoption by the industry. As regards members' view on setting up a "Do-not-call" register for person-to-person telemarketing

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calls, SCMA said that the Administration would relay the views of members to the relevant Bureau, namely, the Commerce and Economic Development Bureau.

13. Noting that the Administration had proposed to adopt an "opt-out" mechanism for collection and use of personal data in direct marketing but was open-minded as to whether an "opt-in" or "opt-out" mechanism should be adopted for sale of personal data, Mr Ronny TONG considered that provision of two checkboxes in the data user's Personal Information Collection Statement ("PICS") for data subjects to clearly indicate whether they agree to or disagree with the collection and use of their personal data was the best way out to solve the problem. Mr TONG further suggested that the Administration should stipulate that a data user who failed to take remedial action specified in an Enforcement Notice ("EN") within a certain period would commit an offence. He considered that it would not only enhance deterrent effect but also save PCPD's effort in monitoring compliance with the EN by a data user.

14. SCMA said that Mr TONG's suggestion was in effect an "opt-in" mechanism. The Administration, however, would consider carefully the suggestion of Mr TONG in deciding on the implementation details. He added that according to the Administration's proposals, while non-compliance with any of the additional specific requirements for collection and use of personal data for direct marketing purposes 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.

15. Mr CHAN Kin-por expressed strong support for adopting an "opt-out" mechanism for direct marketing purposes as such a mechanism was commonly adopted in other business operations. He opined that consumers after all should have the responsibility to read through the provisions of any contract before it was made. Mr CHAN criticized that PCPD had failed to give a full and clear picture to members when providing information on overseas regulatory regimes on direct marketing in his paper. He considered that PCPD had misled members into believing that most overseas countries had adopted the "opt-in" mechanism while the mechanism was adopted for person-to-person telemarketing in Germany only. Mr WONG Kwok-hing, however, opined that PCPD had already provided details of the relevant overseas regulatory regimes in the annex to his paper.

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16. PCPD stated that his Office's findings on overseas regulatory regimes had been fully and correctly set out in his paper [LC Paper No. CB(2)582/10-11(04)]. He explained that while Germany was in the forefront in adopting an "opt-in" mechanism for person-to-person telemarketing, there was an obvious tendency in other overseas countries to shift to an "opt-in" regime for direct marketing activities so as to afford better protection of personal data privacy. He stressed that he aimed to explain the overseas regulatory regimes in his paper in a succinct manner and he had also provided details in the Schedule attached to his paper which comprised extracts from the relevant legislations of the overseas jurisdictions concerned. Mr Paul TSE suggested PCPD to refine the presentation of his paper as appropriate in order to give a clearer picture of the overseas regulatory regimes.

17. Ms Audrey EU was of the view that it was unrealistic to expect consumers to read through every detailed provision whenever they entered into any contract for goods or services. She enquired whether PCPD would consider introducing different mechanisms for collection and use of personal data having regard to the purpose of collection (e.g. an "opt-out" mechanism could be adopted when a company collected additional personal data from its customers for a purpose similar to the original purpose of collection whereas an "opt-in" mechanism should be adopted for collection of personal data for any purpose unrelated to the original purpose of collection). Dr Priscilla LEUNG made a similar suggestion. Ms EU also enquired whether an enlarged font size would be used in a PICS to remind consumers of their choices.

18. PCPD responded that Data Protection Principle ("DPP") 3 of the existing PDPO stipulated that, without the prescribed consent of the data subject, personal data shall not be used for any purpose other than the purposes for which the data were to be used at the time of collection or a directly related purpose. A data user had to seek additional explicit consent from a data subject on other purposes for which the data were to be used. That requirement also applied to collection of personal data for direct marketing activities. He added that according to the proposals in the Consultation Report, the presentation of the information in PICS should be reasonably readable and understandable by the general public. SCMA assured members that clear presentation of the information in PICS would be required irrespective of the mechanism to be adopted. In addition to the *Guidance on the Collection and Use of Personal Data in Direct Marketing* recently issued by PCPD, a guidance note or code of practice on the new

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requirements under PDPO would be provided by PCPD for the direct marketing industry to follow.

Criminal investigation and prosecution powers of PCPD

19. While considering that it was important to have criminal investigation and prosecution power vested separately in the Police and Department of Justice ("DoJ") to ensure checks and balances, Ms Audrey EU asked whether the Administration would consider taking forward the PCPD's proposal under which PCPD would only present the facts to the Court while the decision on whether or not to prosecute shall remain with the Secretary for Justice.

20. Ms Emily LAU said that the Democratic Party was supportive of empowering PCPD to conduct criminal investigation as the Police might lack the resources and expertise to handle cases involving contravention of PDPO. Mr Albert HO opined that the prosecution power should be vested in DoJ and PCPD should be conferred with the power to conduct criminal investigation. He enquired whether the Administration had provided relevant training to the Police in conducting criminal investigation into cases of privacy contravention. Noting that PCPD had expressed concern that the Police did not accord priority to investigation into criminal cases under PDPO, Mr LEUNG Kwok-hung shared the concern about the lack of resources of the Police to handle cases referred by PCPD. He enquired about the financial and manpower resources deployed by the Police to tackle cases involving contravention of PDPO since its implementation in 1996.

21. SCMA responded that the Administration maintained the view that 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. The Administration considered that the existing arrangement had been functioning well and should not be changed lightly. He stressed that in its "Report on Reform of the Law Relating to the Protection of Personal Data" published in August 1994, the Law Reform Commission ("LRC") also opined that vesting a single authority with both enforcement and punitive functions was undesirable and recommended that PCPD's role should be limited to determining whether there had been a breach of DPPs. Since PCPD would be empowered to provide legal assistance to an aggrieved data subject to institute legal proceedings against a data user to seek compensation under section 66 of PDPO under the amendment proposal, it would give rise to

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conflict of interest if PCPD was also empowered to conduct criminal investigation into contravention of PDPO by a data user. He said that the Administration considered that PCPD should continue to exercise his investigation power available under the existing framework of PDPO and put more emphasis on its education and complaint handling works as an advocate for privacy protection.

22. SCMA further assured members that the Police had substantial experience in criminal investigation and attached great importance to handling cases of privacy contravention referred by PCPD. The Administration would discuss the matter with the Police with a view to strengthening the cooperation between PCPD and the Police in following up cases under PDPO.

23. Mr LEUNG Kwok-hung, however, considered that it was unacceptable for the Administration to justify its decision not to confer criminal investigation and prosecution powers on PCPD on the basis of the LRC's view expressed years ago. Pointing out that the new concept of reverse burden of proof had been applied in the Prevention of Bribery Ordinance (Cap. 201), he stressed that the Administration should have reviewed the legislation to meet the needs of the society. SCMA reiterated that it was the fundamental principle that the powers of criminal investigation and prosecution should be vested with separate authorities to ensure checks and balances. Upon the request of Mr LEUNG, SCMA undertook to provide information on the cooperation between the Office of PCPD and the Police in conducting criminal investigation and prosecution work of cases relating to contravention of PDPO.

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24. Dr Priscilla LEUNG agreed with the Administration that PCPD should not be conferred with prosecution power. She said that it was not appropriate to grant a single body too much power so as to ensure checks and balances. Dr LEUNG further cautioned that the Administration should stipulate clearly the circumstances under which a data user would commit an offence or be liable to civil claim when amending PDPO in order to avoid causing undue pressure to frontline staff handling personal data. Mr Paul TSE shared the view that PCPD should not be empowered to conduct criminal investigation and prosecution. He considered that similar to the Equal Opportunities Commission ("EOC"), PCPD should concentrate on providing mediation services and legal assistance to data subjects such as instituting civil claims on behalf of aggrieved data subjects. Dr LEUNG and Mr TSE stressed that the Administration should deploy adequate staff

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with the expertise in privacy protection in relevant government departments to undertake the criminal investigation and prosecution work based on the information provided by PCPD.

PCPD 25. In response to Ms Audrey EU's enquiry on details of awarding compensation to aggrieved data subjects by the Australia's Privacy Commissioner, PCPD advised that the Australia's Privacy Commissioner was empowered to make a determination to award compensation of a specific amount, ranging from AUD1,000 to AUD5,000 in past cases, to an aggrieved data subject if the complainant could prove that he or she suffered substantive loss or damage arising from a contravention of the privacy law by a data user. At the request of Ms EU, PCPD undertook to provide more information on relevant cases on compensation awarded to aggrieved data subjects by Australia's Privacy Commissioner.

Application and implementation of PDPO

26. Ms Emily LAU expressed dissatisfaction that after 13 years of implementation of PDPO, the Administration was unable to tell unequivocally whether PDPO would be applicable to the offices set up by the Central People's Government ("CPG") in the Hong Kong Special Administrative Region ("HKSAR"). She urged the Administration to expedite its liaison with CPG and introduce relevant amendments to PDPO to address the issue. SCMA said that the Administration would continue with its effort to follow up on the issue. However, the current review of PDPO, which aimed at enhancing the protection of personal data privacy of the public having regard to social development, would not cover the issue.

27. Noting that PCPD had indicated that pending the Administration's decision, his Office was ready to implement section 33 of PDPO, Ms Emily LAU asked why the Administration had not implemented the provision to prohibit the transfer of data by data users to another territory where comparable privacy protection was lacking. SCMA replied that as implementing section 33 would have significant implications on data transfer activities of various sectors of the community, the Administration needed to consult stakeholders to assess the readiness of the community for the operation of section 33. PCPD supplemented that he had embarked on the preparation work and provided relevant background information on the privacy protection regime in overseas countries for the Administration's consideration. However, the Administration had requested for supplementary information during a meeting which was held the week

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before to discuss the implementation of section 33 of PDPO and he would provide the information accordingly.

28. Dr Priscilla LEUNG expressed concern that it would not be practical or feasible to regulate data processing outside Hong Kong having regard to the prevalence of cross-boundary data transfer activities of various sectors such as the banking and telecommunications sectors in recent years. In her view, it had not been carefully thought through when section 33 of PDPO was enacted. She stressed that careful re-assessment of the enforceability of the provision would be warranted. Mr Paul TSE echoed the view that it might not be feasible to regulate cross-boundary data processing in view of the fast technological advancement. He opined that the Administration should exercise caution in reviewing PDPO having regard to the actual social need to avoid unnecessary radical changes. SCMA replied that the Administration would be mindful of those concerns. The Administration was aware that if the proposal of making it an offence for unauthorized sale of personal data by data users was implemented, Hong Kong would be in the forefront in that aspect.

29. Referring to the Yahoo case in which the IP address of a journalist who was an email user of "Yahoo! China" residing in the People's Republic of China was disclosed by "Yahoo! Holdings (Hong Kong) Limited" leading to his arrest and conviction of the offence of illegally providing state secrets to foreign entities, Mr Albert HO enquired whether the Administration would review the definition of "personal data" under PDPO. He was concerned that if a narrow interpretation of "personal data" was adopted, other information such as the data transaction record of internet users which could be used to ascertain the identity of an individual might also be disclosed by internet service providers in the absence of any deterrent measure, undermining the protection of personal data privacy on the internet.

30. SCMA explained that as detailed in Annex 5 to the Consultation Report, the former PCPD in his investigation report on a complaint against an e-mail service provider issued in March 2007 took the view that an IP address *per se* did not meet the definition of "personal data" because IP address was about an inanimate device, not an individual. It alone could neither reveal the exact location of the electronic device concerned nor the identity of the user. SCMA advised that if an IP address was used in conjunction with other identifying particulars of an individual, those data would be afforded protection under the existing PDPO.

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Sale of personal data

31. Mr Ronny TONG opined that sale of personal data of consumers by data users to third parties should under no circumstances be allowed. He was concerned that the Administration had not proposed in the Consultation Report to prohibit re-sale of personal data by third parties. Mr TONG considered that the Administration should prohibit any sale of personal data or at least the re-sale of personal data by a third party. Mr Paul TSE, however, considered that it was not feasible and practical for the Administration to do so.

32. SCMA responded that careful examination of the regulatory regime was warranted to avoid causing undue burden to the direct marketing industry which had provided many employment opportunities in Hong Kong and contributed to the development of the local economy.

33. Mr CHAN Kin-por stressed that the Administration should differentiate between sale of personal data by enterprises to others and sharing of personal data among business partners for direct marketing purpose. While the Administration should combat unauthorized sale of personal data, it should be mindful of the fact that it was a common business practice for enterprises to use or share the personal data of their clients with its business partners for direct marketing activities. Mr CHAN considered that the practice of using personal data for direct marketing was widely accepted provided that the consent of consumers were sought and the personal data would be properly destroyed after use. SCMA reiterated that the Administration would strike a balance between safeguarding the personal data privacy of the public and maintaining a business-friendly environment for the continued survival of the direct marketing industry. The overarching principle was to ensure that the amendments to PDPO were reasonable and practicable.

Progress of the review of PDPO

34. Noting that PCPD was collecting public views through its website on those PCPD's proposals which the Administration had indicated that it would not take forward, Mr CHAN Kin-por enquired how PCPD would handle the views collected. He said that PCPD should consider these views in an impartial and open manner. Ms Emily LAU concurred with the view, saying that the Administration should discuss with PCPD on how the legislative proposals should be taken forward.

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35. PCPD replied that in the past two months, his Office had been inviting from and exchanging views with relevant organizations and stakeholders on the proposals which the Administration intended not to pursue. His Office had also launched an on-line survey to facilitate members of the public to give their views. Based on the views collected and the results of the survey, he would make a submission to the Administration for its consideration. PCPD observed that so far most of the respondents to the on-line survey were from relevant organizations and industries having a direct interest in the issues involved, and called on the members of the public to participate in the survey and indicate their support for implementing some proposals such as the establishment of the "Do-not-call" register to regulate unsolicited person-to-person telemarketing calls. He assured members that he would reflect all the views collected to the Administration in an impartial manner.

36. SCMA advised that the Administration had always kept close liaison with PCPD to take forward the review of PDPO. He said that while PCPD would review PDPO from a professional stance, the Administration would need to assess the overall implication of the proposals on the community from a macro perspective. Although the Administration and PCPD had different views on some issues, they had reached consensus on most of the proposals such as introducing in PDPO additional specific requirements on data users for the collection and use of personal data for direct marketing and empowering PCPD to provide legal assistance to aggrieved data subject to institute legal proceedings to seek compensation under section 66 of PDPO.

37. In response to Mr WONG Kwok-hing and the Chairman, SCMA said that the Administration would revert to the Panel on its final set of legislative proposals on the review of PDPO at a later stage before submitting a Bill to LegCo in mid 2011.

38. Ms Emily LAU suggested that the Panel should form a subcommittee to study the review of PDPO and related issues. At the invitation of the Chairman, SCMA advised members that the consultation period on the Consultation Report would end in December 2010 and the Administration intended to introduce the relevant Bill into LegCo in mid 2011. It would be for the House Committee to decide whether a bills committee should be formed to study the Bill. The Administration considered that there was no need to form a subcommittee at the current stage to study the issue and the Panel could continue its discussion of the review and related issues at the coming Panel meetings if necessary.

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39. Responding to the Chairman, the Clerk informed members that the maximum number of subcommittees on policy issues which could be in operation at any one time was limited to eight. However, there were at present 11 such subcommittees in operation already. It would be for the House Committee to decide whether the quota could be further relaxed. The Chairman opined that given the circumstance, if the Panel set up the proposed subcommittee, the House Committee might not allow it to activate at the current stage. He suggested that the Panel might further discuss the issue at the coming regular meetings if necessary.

IV. Third report of the Hong Kong Special Administrative Region under the International Covenant on Economic, Social and Cultural Rights

[Third Report of the Hong Kong Special Administrative Region under the International Covenant on Economic, Social and Cultural Rights, LC Paper Nos. CB(2)582/10-11(07) and (08)]

40. Under Secretary for Constitutional and Mainland Affairs ("USCMA") briefed members on the third report of HKSAR under the International Covenant on Economic, Social and Cultural Rights ("ICESCR") ("the third HKSAR report") as set out in the Administration's paper [LC Paper No. CB(2)582/10-11(07)].

41. Members noted the background brief prepared by the LegCo Secretariat [LC Paper No. CB(2)582/10-11(08)] on the subject under discussion.

Article 2 : Progressive realization of the rights recognized in the Covenant and the exercise of those rights without discrimination

Protection for persons with disabilities

42. Mr LAU Kong-wah expressed concern about the problem of accessibility faced by persons with disabilities ("PWDs") and the elderly. He pointed out that some of the pedestrian footbridges which were designed 20 years ago were not in compliance with the requirements of the Design Manual: Barrier Free Access 2008 and posed serious accessibility problem to PWDs and the elderly. He considered that as the estimated amount of the Government's fiscal surplus was as high as \$70 billion, the Administration should set aside funding to install lifts to address the

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accessibility problem. He further urged that different bureaux and government departments should enhance their co-ordination in the provision of a barrier-free environment for PWDs.

43. Principal Assistant Secretary for Labour & Welfare (Poverty) ("PASLW") responded that it was the Government's policy to provide a barrier-free environment to PWDs. Following the legislative amendments to the Building (Planning) Regulations (Cap. 123F) in August 2008, newly constructed buildings had to meet a series of new requirements in the provision of barrier-free access to and the use of the building and its facilities by PWDs. For existing buildings, the Architectural Services Department, taking into account the recommendations of the Sub-committee on Access of the Rehabilitation Advisory Committee, would enhance barrier-free facilities to buildings which were frequented by PWDs. Since 2000, the Government had improved the access facilities of 147 Government premises. The Labour and Welfare Bureau would continue to advise individual Government bureaux/departments to review the policies/measures under their purview with a view to providing a barrier-free living environment for PWDs.

Human rights institution

44. Ms Emily LAU expressed concern that the independence of the three statutory bodies, namely the Office of The Ombudsman, EOC and the Office of PCPD, which undertook human rights protection work would be undermined as all of them were headed by former senior civil servants. Ms LAU suggested that the Administration should establish an independent human rights institution with a broad mandate as recommended by the United Nations Committee on Economic, Social and Cultural Rights ("UNCESCR") to oversee all issues on human rights protection.

45. USCMA responded that the Government's position had been clearly stated in the third HKSAR report, which was that an extensive mechanism for human rights protection in Hong Kong was already in place, and there was no obvious need for another human rights institution to duplicate the functions of the existing mechanism. As regards the procedures in appointing heads of the independent statutory bodies, in the cases of EOC and the office of PCPD for example, selection boards were set up to recommend to the Chief Executive ("CE") the most suitable candidates for appointments in accordance with established procedures and relevant legislative provisions, and based on fair and objective criteria. The

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appointed candidates would independently discharge their duties as stipulated in the corresponding legislation.

Discrimination on the ground of sexual orientation

46. Ms Cyd HO was of the view that the protection of the sexual preference of the minorities should not be determined by the majority views. The Administration should take the lead in prohibiting discrimination on the ground of sexual orientation. She asked whether the Administration would introduce legislation to outlaw discrimination on the ground of sexual orientation and whether it had any forward-looking plan to protect the rights of minorities in this aspect.

47. USCMA responded that views in the community on the need to legislate against discrimination on the ground of sexual orientation were diverse. It was not an appropriate time to consider introducing legislation in this aspect. The Administration would continue to promote non-discrimination and equal opportunities for all through public education and publicity.

48. Ms Cyd HO considered that as the fiscal surplus was estimated to be as high as \$70 billion, resources allocated for the protection of the rights under ICESCR was not in due proportion. She queried how the Administration could explain to UN and the community why only slow progress had been made in the implementation of the recommendations of UNCESCR.

49. USCMA responded that the Administration had carefully considered public views received when drafting the report. Moreover, the Government had a set of fiscal philosophy that worked for the interests of Hong Kong. In formulating the budget for the coming year, the Financial Secretary would take into account the financial position of the Government as well as the aspirations of the community.

Article 3 : Equal rights of men and women

50. Mr WONG Kwok-hing said that men had been in a weaker position since Hong Kong was transformed from an industrial society to a post-industrial society. He had moved a motion at the Council meeting of 11 November 2009 for debate requesting the Government to provide support services for men in Hong Kong. He was disappointed that the Government

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had neither formulated any policies nor set aside resources to address the problems faced by men in relation to employment, education, health and family.

51. USCMA responded that under the Sex Discrimination Ordinance (Cap. 480) ("SDO"), the protection for women was also applicable to men. As EOC was conducting a study on the difficulties faced by men in Hong Kong, the Administration would make reference to the study in formulating policies in this respect. PASLW supplemented that while most of the welfare services were provided to the needy irrespective of their gender, non-governmental organizations ("NGOs") had discretion in the allocation of their resources to provide services to meet the needs of the community.

52. Mr WONG Kwok-hing considered that the Administration should have actively introduced measures to help alleviate the problems faced by men instead of having to wait for the completion of the EOC's study. He said that it was the first time the protection of men's rights was raised during the discussion on the report under ICESCR and urged the Administration to follow up the issue.

53. USCMA responded that the Administration had carefully considered the views and suggestions of Members expressed during the relevant motion debate. The Administration had also considered the views received from different channels. The study carried out by EOC would serve as a good reference for the Administration to formulate relevant policies to alleviate the problems particularly faced by men.

Article 10 : Protection of the family

Care and support for the elderly

54. Mr Albert HO expressed concern about the issue of poverty in Hong Kong, especially poverty among the elderly. He recalled that UNCESCR had raised concerns and made recommendations concerning the issue in its concluding observations issued after consideration of the first and second reports of HKSAR in 2001 and 2005 respectively. However, little progress had been made by the Administration to address the problem. He pointed out that there were many outstanding matters to be dealt with, including the long waiting time for the elderly to be allocated a residential care place, the low Comprehensive Social Security Assistance ("CSSA") rates and inadequate provision of medical services for the elderly. Mr HO asked why

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the Administration did not expedite its work in buying more places from private care homes and in building more residential care homes for the elderly given its huge fiscal surplus.

55. PASLW responded that the Government's policy was supporting ageing in place as the core, institutional care as back-up. To meet the policy objective, the Government had provided a range of subsidized home-based and centre-based community care services to the elderly. More than 25 000 elderly people had benefited from these community services. On the other hand, the resources allocated for the provision of subsidized residential care places for the elderly had been drastically increased by more than 60% since 1997. The Government was providing some 26 000 subsidized residential care places for the elderly, representing 44% of the total number of residential care places for the elderly in Hong Kong. Since 1998, the Government had enhanced its scheme by buying residential places from private care homes with a view to improving the provision of residential care places for the elderly.

New arrivals from the Mainland

56. Ms Audrey EU expressed concern that the Administration had not attached importance to the problem of discrimination against and the difficulties encountered by new arrivals from the Mainland. She was of the view that the Race Discrimination Ordinance (Cap. 602) ("RDO") should cover discrimination against new arrivals from the Mainland because these new arrivals constituted a distinct community and the problem of discrimination against them was prevalent. Referring to paragraph 10.37 of the third HKSAR report which stated that like other local residents, new arrivals were entitled to various welfare services, she said that the information did not reflect the problem that new arrivals who did not meet the seven-year residence requirement were not eligible for the CSSA Scheme.

57. USCMA responded that RDO did not exclude new arrivals from the Mainland from its ambit. The Ordinance applied equally to all persons in Hong Kong, including the new arrivals, and safeguarded their right against discrimination on the ground of race. The Administration had provided a range of services to the new arrivals to facilitate their integration into the local community. However, they would need to meet certain requirements in applying for some of the services, such as CSSA and public rental housing ("PRH"). She added that CE had stated in his 2010-11 Policy

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Address that the Permanent Secretary for Home Affairs would lead a dedicated team to step up and co-ordinate efforts in the provision of services to both the new arrivals from the Mainland and ethnic minorities. The team would closely monitor the service needs of new arrivals during the adaptation period to ensure that the support services could meet their needs. The team would also enhance collaboration with NGOs and district organizations to facilitate the early integration of new arrivals into the local community.

Single parent families and split families

58. Ms Audrey EU said that the Administration should have responded to the concern repeatedly expressed in the concluding observations of UNCESCR in relation to single-parent families and split families. She criticized that the recommendations made by the Subcommittee to Study Issues Relating to Mainland-HKSAR Families were not taken forward by the Administration and Members' views also were not reflected in the third HKSAR report. Ms EU further asked whether the Administration would include in the report all the views received in relation to the implementation of the ICESCR in Hong Kong.

59. USCMA said that the Administration had considered the views received from Members, concern groups and members of the public and provided responses in the third HKSAR report as appropriate. Some of the recommendations made in the previous concluding observations of UNCESCR had been implemented as set out in the report. For those recommendations which had not been taken forward for the time being, the Administration had explained its considerations and the grounds for its decisions in the report.

60. Noting that cooperation between the HKSAR Government and CPG would be required to tackle the issue of split families, Mr Alan LEONG enquired whether the Administration would communicate with CPG in drawing up policies which could better meet the aspirations of the community. USCMA responded that there were established channels for the Security Bureau to communicate regularly with the relevant Mainland authorities to deal with the issue of split families. She assured members that the HKSAR Government and CPG were working closely in this regard.

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Article 11 : Right to an adequate standard of living

The right to continuous improvement of living condition

61. Mr Albert HO expressed concern that the third HKSAR report was silent on the issue of disparity between the rich and the poor. He said that the Gini Coefficient for Hong Kong was 0.533 in 2006, indicating a widened income disparity. According to the report of the Hong Kong Council of Social Service, the number of the in-work poor had exceeded 1.2 million. Mr HO considered that the Administration should establish a poverty line and formulate policies to alleviate the poverty problem.

62. PASLW responded that the Government had facilitated transfer of social benefits to reduce income disparity through taxation and provision of social welfare, including a wide range of free and heavily subsidized services in education, healthcare, and housing. The adjusted Gini Coefficient, taking into account transfer of social benefits, showed that the wealth gap had not widened during the period between 1996 and 2006. He added that the former Commission on Poverty ("CoP") had considered it inappropriate for Hong Kong, being a relatively affluent city, to use a single income-based indicator to draw a poverty line. The Administration agreed with CoP's views and had all along been adopting the 24 multi-dimensional indicators recommended by CoP to monitor the poverty situation of different groups of people in Hong Kong and to take necessary measures to meet their needs.

63. Ms Emily LAU echoed the concern that the third HKSAR report had not addressed the poverty problem despite Members' repeated requests for the Administration to introduce measures to combat poverty and to reinstate CoP. PASLW responded that in his 2010-11 Policy Address, CE had outlined the overall strategy in combating poverty. The Administration would invest in education, enhance social mobility, provide work incentive subsidy, and a social security net through the CSSA Scheme for the needy. Although CoP had completed its work in 2007, the Administration had set up the Task Force on Poverty and duly followed up on 53 recommendations made by the CoP. Most of the recommendations had been or were being implemented, including the setting up of a Child Development Fund, introduction of the Transport Subsidy Scheme, provision of retraining programmes for the middle-aged and the low-income earners, and implementation of community based programme for the elderly.

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The right to adequate housing

64. While noting from the third HKSAR report that the number of street sleepers had declined from 785 in 2002 to 405 in 2009, Mr LAU Kong-wah expressed concern that there were still hundreds of street sleepers in an affluent society like Hong Kong. Pointing out that there were street sleepers frozen to death in a recent cold spell, Mr LAU queried whether the existing housing policies were effective in addressing the housing needs of the street sleepers.

65. Chief Housing Manager (Applications) of the Housing Department responded that the Housing Department had been providing PRH to low-income families who could not afford private accommodation. Any eligible persons, including street sleepers, who passed the income and asset test could apply for PRH. The Government would maintain the average waiting time for PRH at around three years.

66. USCMA supplemented that according to her understanding, the Social Welfare Department ("SWD") kept a record on the number of street sleepers and their place of abode. In anticipation of cold spells, SWD would provide blankets for street sleepers and attend to their needs. SWD had maintained communications with street sleepers about their wish to apply for PRH or to be provided with other accommodations. At the request of Mr LAU Kong-wah, USCMA undertook to provide information on the measures taken by SWD in addressing the needs of street sleepers.

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Article 13 & 14 : Right to education

Cultural identity and national values

67. Mr LAU Kong-wah said that while all students would enjoy 12 years of free education in Hong Kong, many of them did not have any knowledge about the history of China since national education was not a compulsory subject in school curriculum. He considered it important for students to have knowledge about the history of China, which would provide a good basis for developing independent and analytical thinking, and problem-solving skills. Mr LAU queried why Chinese History was not included as one of the compulsory subjects in the Hong Kong school curriculum given that 13 years had passed since the resumption of the exercise of sovereignty.

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68. Senior Curriculum Development Officer (Chinese)³ of the Education Bureau responded that at present all students were already studying Chinese History, either as an independent subject or under other subjects. In the 2010-11 Policy Address, CE had announced a new initiative on moral and national education. Curriculum Development Council was tasked to review the curriculum, and to develop an independent subject on "moral and national education". He believed that this issue would be revisited during future consultations.

Education for non-Chinese speaking students

69. Ms Emily LAU enquired whether the Government's policy that 18% secondary students in Hong Kong would be provided with subsidized tertiary education was also applicable to ethnic minorities. She further asked whether the Administration had statistics regarding admission of non-Chinese speaking ("NCS") students to local universities.

70. Senior Education Officer (Education Commission) of the Education Bureau ("SEO(EC)") responded that to address the aspirations of NCS students for higher education, the Administration had put in place various support measures. Since 2007, the General Certificate of Secondary Education ("GCSE") (Chinese) examination had been administered in Hong Kong for students who wished to obtain an alternative Chinese Language qualification. Subsequently, the examination fee of GCSE (Chinese) examination had also been reduced to a level on a par with the fee of local Chinese examination for eligible students. GCSE (Chinese) qualification was considered for acceptance by the University Grants Committee-funded institutions under the Joint University Programmes Admissions System ("JUPAS"). The Administration would continue to evaluate the effectiveness of various measures and take into consideration the views of different stakeholders. On the statistics on NCS students being offered a place under JUPAS, SEO(EC) said that in 2009, 38 NCS students had sat for the Hong Kong Advanced Level Examination, and 17 of them had been offered a place under JUPAS.

Date of the UNCESCR's hearing

71. In response to Ms Emily LAU's enquiry about the date of the UNCESCR's hearing to examine the third HKSAR report, USCMA advised that the date of the hearing had yet to be fixed. Mr LEE Cheuk-yan informed the meeting that as in the past, the Hong Kong Confederation of

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Trade Unions would submit an alternative report to UN stating its position and dissatisfaction about the third HKSAR report. The Confederation would complain to UN about, among other things, the long working hours of employees in Hong Kong, the absence of the right of collective bargaining, and the problem of racial discrimination. He considered that the Administration had failed to appreciate the problem of long working hours faced by local employees. The Administration should have stated in the report future regulation of working hours. On the right of collective bargaining, Mr LEE said that the Administration was only encouraging communication, consultation and voluntary negotiations between employers and employees. The Government's position was inconsistent with ICESCR, as well as the International Labour Convention which guaranteed the right of collective bargaining. As regards racial discrimination, Mr LEE said that as employment contracts signed before RDO coming into effect in 2009 were exempted under the Ordinance, local pilots were employed by Cathay Pacific Airways under less favourable terms and conditions as compared with their foreign counterparts.

72. Ms Emily LAU further enquired about the Panel's plan to receive views from the public on the third HKSAR report. Responding to the Chairman, the Clerk advised that it was the usual practice of the Panel to receive views from the public near the time when UNCESCR's hearing would be held. Members agreed that the Panel would receive views from the public on the report at a future meeting upon confirmation of the date of the hearing.

73. There being no other business, the meeting ended at 5:30 pm.