OFFICIAL RECORD OF PROCEEDINGS

Monday, 25 June 2012

The Council continued to meet at Nine o'clock

MEMBERS PRESENT:

THE PRESIDENT
THE HONOURABLE JASPER TSANG YOK-SING, G.B.S., J.P.

IR DR THE HONOURABLE RAYMOND HO CHUNG-TAI, S.B.S., S.B.ST.J., J.P.

THE HONOURABLE LEE CHEUK-YAN

DR THE HONOURABLE DAVID LI KWOK-PO, G.B.M., G.B.S., J.P.

THE HONOURABLE FRED LI WAH-MING, S.B.S., J.P.

DR THE HONOURABLE MARGARET NG

THE HONOURABLE JAMES TO KUN-SUN

THE HONOURABLE CHEUNG MAN-KWONG

THE HONOURABLE CHAN KAM-LAM, S.B.S., J.P.

THE HONOURABLE MRS SOPHIE LEUNG LAU YAU-FUN, G.B.S., J.P.

DR THE HONOURABLE PHILIP WONG YU-HONG, G.B.S.

THE HONOURABLE WONG YUNG-KAN, S.B.S., J.P.

THE HONOURABLE LAU KONG-WAH, J.P.

THE HONOURABLE LAU WONG-FAT, G.B.M., G.B.S., J.P.

THE HONOURABLE MIRIAM LAU KIN-YEE, G.B.S., J.P.

THE HONOURABLE EMILY LAU WAI-HING, J.P.

THE HONOURABLE TIMOTHY FOK TSUN-TING, G.B.S., J.P.

THE HONOURABLE TAM YIU-CHUNG, G.B.S., J.P.

THE HONOURABLE LI FUNG-YING, S.B.S., J.P.

THE HONOURABLE AUDREY EU YUET-MEE, S.C., J.P.

THE HONOURABLE VINCENT FANG KANG, S.B.S., J.P.

THE HONOURABLE WONG KWOK-HING, M.H.

THE HONOURABLE LEE WING-TAT

DR THE HONOURABLE JOSEPH LEE KOK-LONG, S.B.S., J.P.

THE HONOURABLE JEFFREY LAM KIN-FUNG, G.B.S., J.P.

THE HONOURABLE ANDREW LEUNG KWAN-YUEN, G.B.S., J.P.

THE HONOURABLE CHEUNG HOK-MING, G.B.S., J.P.

THE HONOURABLE WONG TING-KWONG, B.B.S., J.P.

THE HONOURABLE RONNY TONG KA-WAH, S.C.

THE HONOURABLE CHIM PUI-CHUNG

THE HONOURABLE KAM NAI-WAI, M.H.

THE HONOURABLE CYD HO SAU-LAN

THE HONOURABLE STARRY LEE WAI-KING, J.P.

DR THE HONOURABLE LAM TAI-FAI, B.B.S., J.P.

THE HONOURABLE CHAN HAK-KAN

THE HONOURABLE PAUL CHAN MO-PO, M.H., J.P.

THE HONOURABLE CHAN KIN-POR, J.P.

DR THE HONOURABLE PRISCILLA LEUNG MEI-FUN, J.P.

THE HONOURABLE WONG SING-CHI

THE HONOURABLE WONG KWOK-KIN, B.B.S.

THE HONOURABLE IP WAI-MING, M.H.

THE HONOURABLE IP KWOK-HIM, G.B.S., J.P.

THE HONOURABLE MRS REGINA IP LAU SUK-YEE, G.B.S., J.P.

DR THE HONOURABLE PAN PEY-CHYOU

THE HONOURABLE PAUL TSE WAI-CHUN, J.P.

THE HONOURABLE ALAN LEONG KAH-KIT, S.C.

THE HONOURABLE TANYA CHAN

THE HONOURABLE ALBERT CHAN WAI-YIP

THE HONOURABLE WONG YUK-MAN

MEMBERS ABSENT:

THE HONOURABLE ALBERT HO CHUN-YAN

THE HONOURABLE LEUNG YIU-CHUNG

THE HONOURABLE ANDREW CHENG KAR-FOO

THE HONOURABLE ABRAHAM SHEK LAI-HIM, S.B.S., J.P.

THE HONOURABLE TOMMY CHEUNG YU-YAN, S.B.S., J.P.

THE HONOURABLE FREDERICK FUNG KIN-KEE, S.B.S., J.P.

PROF THE HONOURABLE PATRICK LAU SAU-SHING, S.B.S., J.P.

DR THE HONOURABLE LEUNG KA-LAU

THE HONOURABLE CHEUNG KWOK-CHE

DR THE HONOURABLE SAMSON TAM WAI-HO, J.P.

THE HONOURABLE LEUNG KWOK-HUNG

PUBLIC OFFICER ATTENDING:

MISS ADELINE WONG CHING-MAN, J.P.
SECRETARY FOR CONSTITUTIONAL AND MAINLAND AFFAIRS

CLERKS IN ATTENDANCE:

MR ANDY LAU KWOK-CHEONG, ASSISTANT SECRETARY GENERAL

MISS ODELIA LEUNG HING-YEE, ASSISTANT SECRETARY GENERAL

MR WONG YUK-MAN (in Cantonese): A quorum is not present.

PRESIDENT (in Cantonese): Clerk, please ring the bell to summon Members to the Chamber.

(After the summoning bell had been rung, a number of Members entered the Chamber)

BILLS

Second Reading of Bills

Resumption of Second Reading Debate on Bills

PRESIDENT (in Cantonese): Council now continues with the resumption of the Second Reading debate on the Personal Data (Privacy) (Amendment) Bill 2011.

(Bill originally scheduled to be dealt with at the last Council meeting)

PERSONAL DATA (PRIVACY) (AMENDMENT) BILL 2011

Resumption of debate on Second Reading which was moved on 13 July 2011

PRESIDENT (in Cantonese): Does any Member wish to speak?

MR WONG YUK-MAN (in Cantonese): President, in the society of Hong Kong where capitalism and free market are enshrined as absolute values, almost anything can be traded; the same is true in the political arena. Yet, "friendship remains even if the deal falls through". Unfortunately, some people will not be on good terms with you when the deal falls through. That is why I often say that human beings can become devils if they stay long enough in politics; and it is sometimes hard to tell whether they are human beings or not. Many politicians have sold out their integrity and some have even betrayed their conscience. The

same is true for businessmen. They can resort to whatever tactics and that is why some of them will sell their customers' information.

In June 2010, the Octopus Holdings Limited (OHL) was found selling its clients' data for marketing purposes, making a profit of more than $40 million. The incident had become the biggest corporate scandal since the founding of Hong Kong. The MTR Corporation Limited (MTRCL), which was set up partly with the money of Hong Kong people, has formed a public-private-partnership with its protégé the OHL, to cheat the people of Hong Kong. How was the scandal settled in the end? We realize that our personal data are under such feeble protection. Subsequently, the Office of the Privacy Commissioner for Personal Data (PCPD) issued an investigation report on the Octopus Rewards Programme, in which the PCPD helplessly stated that the Personal Data (Privacy) Ordinance (PDPO) had conferred limited power to the PCPD in respect of punitive actions and prosecution. By giving such an easy way out for the OHL, the authorities have aroused strong public indignation. The Personal Data (Privacy) (Amendment) Bill 2011 (the Bill) has indeed come too late.

The so-called Octopus incident or scandal had been heatedly debated in the Legislative Council. Some Members austerely said that we should invoke the power of the Legislative Council (Powers and Privileges) Ordinance to request the OHL to provide more information and to give a full account; but in the end, the proposal was pre-empted and a non-binding motion was moved in this Council instead. We just made a few comments and called it a day.

Mr James TO of the Democratic Party is going to propose many amendments today. I have spent some time reading through them, and I anticipate that I can at least spend three hours speaking at the Committee stage. I must thank Mr James TO for being so professional. He did not do his job perfunctorily but has pragmatically prepared the amendments in a professional manner. President, I earnestly hope that at the Committee stage held later, Members can actively express their views. Members have repeatedly said that they will plead in the name of the people and that we should not stall on important bills that are related to people's livelihood; and that we should brook no delay and should not waste any more time and taxpayers' money. However, at the Committee stage to be held later when we will discuss the important amendments to the Bill, if Members are as silent as they were at the debates on Mandatory Provident Fund Schemes (Amendment) (No. 2) Bill 2011 and the

Competition Bill, President, they will be a disgrace to this Council and you will also be humiliated.

Mr James TO insisted at that time that an investigation committee should be established to inquire into the matter, but in the end, the matter was settled by not settling it. After the Octopus incident, we realize that bodies vested with public power are in fact very vulnerable. These public bodies, such as the Government, the PCPD and the Legislative Council, can do nothing to deal with the monopoly or the trick and force created by the capitalistic market.

In principle, we certainly agree that organizations or individuals selling personal data to third parties should be regulated, in order to safeguard personal privacy. According to Article 12 of the Universal Declaration of Human Rights, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." Privacy is very important to an individual. However, in an open society and in the realm of democracy and freedom, a public figure will have less privacy as compared with that of an insignificant nobody. This is the price the public figure has to pay for the celebrity, applause and vainglory that he enjoys. Very often, we have to strike a balance.

In my 10-odd years of teaching journalism in tertiary institutions, I often held discussions on this subject: how to strike a balance between people's right to know and an individual's privacy? Can this problem be solved by the law? For instance, in the discussion on anti-stalking legislation earlier, many celebrities overwhelmingly said in the consultation exercise that the paparazzi should be put out of work. However, to the news media, it would be best if a celebrity lives in a house with full-sized transparent windows. So, this is just a matter of different parties having different needs. In the name of so-called freedom to get close to the news and freedom of the press, the news media prefers public figures to be living in a glass house, so that reporters can see clearly what is going on inside. What reporters want is not just a glass house, but that the house should not be illegally built.

Hence, when the stances are different, conflicts will arise. In particular, in an open society where freedom of the press is upheld and information is unlimitedly circulated, coupling with the rapid development of the Internet, the corners of the world can be so far apart and yet so close in the virtual world.

The world is like a global village. With a click of the computer button, you can almost see anything happening around the world. As such, personal privacy basically can be infringed on anytime.

Personal privacy can also be infringed on by public power. Members also know how the Interception of Communications and Surveillance Ordinance came into existence. It came into existence because the Government had no regard of the law. It intercepted telephone conversations, carried out stalking and installed video cameras right across the other side of people's residence. The Government had done all these in the name of combating crimes, so as to let law-enforcement authorities had adequate power to combat crimes. The truth is that the Government wishes to provide sufficient excuses for law-enforcement authorities to arbitrarily carry out stalking. Hence, paparazzi are not exclusive to newspapers. The Police Force also has "paparazzi", which is the nick name for the Criminal Intelligence Bureau.

Recently, there are interferences in our phones. Who dare to say that our phone calls are not intercepted? That is why I recently bought a few cheap mobile phones, each costing $200-odd, and I have changed to use pre-paid phone cards, so that I can discard the cards when I have used up the value stored inside. If I am going to say something confidential …… Why do we have to say something confidential? In fact, there is nothing confidential, but with the election approaching, we have to be on guard. I do not even know what my phone number is. The phone cards, each with a stored value of $75, can be discarded afterwards, saving us much trouble. Even the phones can be discarded after using them for some time.

Why do I have to do so? It is because people may intercept my phone calls and messages anytime. We use our phones to receive messages and bullshit with others. Sometimes, some improper messages may come through …… We use these smart phones to go online, listen to the programme hosted by "Tai Pan", see some silly clips or check our Facebook account; or we use them to check out how LEUNG Chun-ying has been satirized by others and whether his spoofed photos have outnumbered TANG Ying-yen's. They are so funny. Being so aloof and powerful in Hong Kong, they deserve to be spoofed. Can they have any personal privacy? Not even you, President, can have personal privacy. You have to do everything by the book. Do you have any personal privacy?

Equally important is the personal privacy of the general public. However, when our personal privacy, that is, the personal privacy of the general public is disturbed or infringed on, there is no way to seek help. Public figures can go in the limelight and slam the news media, or readily initiate legal proceedings against them; but what can an ordinary member of the public do? I remember when I worked as a reporter for a certain newspaper, I had to be abided by a code of practice, and this is, press freedom should go hand in hand with self-discipline. For instance, if we covered a piece of news about a child, we would never show photos of the child below 18 on the newspaper; if the news was about kidnapping, we definitely would not expose the name of the victim in the news. However, nowadays, even the name of the victim's father will be reported lest the father will not get killed. In the past, there was an unspoken consensus that we should not jeopardize any vulnerable individual, who was isolated, helpless and with no way to lodge complaints, by exposing his personal privacy for the sake of boosting the sale of the newspaper or upholding the so-called public's right to know.

Certainly, the law is the law. Heteronomy is passive, so is the law; only autonomy is more active. However, some people cannot even be abided by heteronomy, how are we going to ask them to act autonomously?

Our existing legislation cannot stop the abuse of personal data. In the Panel on Information Technology and Broadcasting, Mr WONG Ting-kwong often gets rowdy about one issue, and that is the problem of cold calls. He would almost throw his phone away whenever he finds that the incoming call comes from a phone number starting with "3". Making cold calls is not regulated by the law. We often ask the Government to introduce legislation on cold calls so as to put them under regulation, but the authorities concerned refuse to do so, saying that this will ruin the business environment. However, we have no clues as to how those business operators can get our phone numbers.

What approach has the Government taken? On the one hand, the Government has said that it wishes to amend the PDPO, but on the other, it freely lets telecommunications operators get hold of our personal data and sell them to third parties. If not, how can insurance agencies and banks frequently call us to sell loan schemes or ask me whether I need to borrow money? When I ask them if the money borrowed needs not be returned, they just hang up. Yet, the short conversation would cost me less than a dollar of telephone charges. However, the Government is unwilling to put a stop to these cold calls.

The existing legislation has obviously failed to stop the abuse of personal data; worse still, some companies have exploited personal data for profit-making. This has gone overboard. I do not know why, to date, the authorities still fail to find a means to tackle these problems. Even the Bill under discussion today contains numerous flaws and will not be able to tackle the core problem. This is truly regrettable.

First, the Secretary is still unwilling to confer power to the PCPD to conduct criminal investigation and institute prosecution, thus turning the PCPD into a "toothless tiger". No matter how beautifully the clauses governing the sale of personal data have been drafted, if we do not have a powerful investigation authority to enforce the law, the irregularities cannot be stopped. Second, despite the Government has taken two years to prepare the Bill, the clauses are still crudely written, without taking the actual enforcement into consideration. For example, for the selling of some sensitive personal information, such as iris characteristics and palm prints, will the same procedure be applied as those for selling simple personal data, such as personal information and names?

Besides, the definition of personal data is outdated. To our surprise, Internet Protocol Address (this is, IP address) has not been included in the scope of personal data. As the 21st century is an era of the Internet, such a legislative approach will simply be passed on as an international laughing stock. After the passage of the Bill, how will the Government convince consumers to accept direct marketing so as to facilitate the continued viability of the direct marketing trade? Some direct marketing operators are of the view that this will …… Mr WONG Ting-kwong has an even bleaker way of putting it. According to him, after the Bill is passed, people who will be protected are those who make cold calls and disturb you every day *(The buzzer sounded)* …… I have not finished, but there is nothing I can do.

MR WONG TING-KWONG (in Cantonese): Mr WONG Yuk-man mentioned my name just now when he spoke. I also have something to say about the Personal Date (Privacy) (Amendment) Bill 2011 (the Bill). Certainly, the Bill has come late. Ever since the incident concerning the Octopus Card came to light, people in society have realized that privacy protection had been seriously inadequate in the past, resulting in personal data being resold for profits. Thus,

we would have serious doubt and distrust against any corporation which gets hold of our personal data.

While I think the Bill is timely and proper, it also has some inadequacies, as mentioned by Mr WONG Yuk-man just now and shared by me. Nevertheless, I am aware that protection of personal privacy is under the purview of the Policy Bureau which tabled this Bill, and what Mr WONG Yuk-man and I have all along castigated is related to the Unsolicited Electronic Messages Ordinance. The scopes of these two ordinances are different. Hence, I hope that the authorities concerned can communicate with other departments to reflect the concerns of Members and the public about privacy protection, in particular, the use of personal data for direct marketing. In this regard, the authorities have said that a review will be carried out in two years' time, but it has been another two years after two years and no review has been carried out. I take this opportunity to urge the authorities and the next-term Government to timely and seriously address this issue.

Speaking of the Personal Date (Privacy) Ordinance just now, a Member mentioned some intimate personal data, such as palm prints, retina patterns and facial characteristics. I hold that the authorities should also conduct further research in this regard. While these personal data are still not so common as phone numbers and names, people's facial characteristics and retina patterns will become more common with the advance of technology. Hence, apart from reflecting my request just now to the relevant departments that the Unsolicited Electronic Messages Ordinance needs to be further reviewed, the authorities should also consider taking an in-depth research into the protection of biometric data privacy, and start exploring how to handle such information so as to protect personal privacy.

President, I so submit.

MR VINCENT FANG (in Cantonese): President, I do not support filibustering, nor do I support Members proposing frivolous amendments. That is why we think that the fewer the Members speak the better. However, the Personal Data (Privacy) (Amendment) Bill 2011 (the Bill) under scrutiny now concerns the retail and service trades which often collect information from customers for marketing purposes, I thus wish to express my views on behalf of the trade.

As we all know, the proximate cause leading to the amendment of the Personal Date (Privacy) Ordinance (PDPO) is that the Octopus Rewards Limited (ORL) resold for profits its customers' personal data to third parties for direct marketing purposes. On the part of data subjects, however, they did not get any benefits and their personal data was disclosed to other parties; besides, they were subject to the nuisance of direct marketing calls and a possible chance of their personal data being abused.

The ORL could do so mainly because of the ambiguity in the present PDPO which does not provide against the reselling of customers' personal data for profits, except when customers' consent has been sought. With much regret, this has contributed to the prevailing practice that a clause, which is only legible with a magnifying class, is added to application or registration forms in general, asking customers if they consent that their personal data be used for other promotional and marketing offers.

Whenever the term "promotional offers" is mentioned, many consumers will be willing to release their personal data. If not, there would not have been so many customers registered under the Octopus Rewards Programme. That is why so many customers are willing to do so. Besides, under the present PDPO, including the original Blue Bill which the Government tabled to the Legislative Council, there is the provision that not making explicit dissent is deemed consent. Serious problems will then arise. It is because customers usually fill out an application form in a hurry, or they may have missed this clause because the words are printed in very small fonts; as a result, they are deemed to have given their consent. No wonder consumers are aggrieved. This in fact resembles the filibustering in the Legislative Council because the Rules of Procedure of the Legislative Council does not expressly provide against filibustering. Hence, when some colleagues adopt this approach, this Council can do nothing to stop them.

Protection of personal data can be strengthened by amending the existing legislation. As for the Legislative Council, there are still many practices which are not expressly prohibited. Should we follow the example of the PDPO and amend the Rules of Procedure of the Legislative Council? This issue will be discussed later at the Committee on Rules of Procedure.

Retaining customers' personal data is a common practice in the retail and service trades. In order to retain customers, many companies would provide various types for services for VIPs, special guests or members. For example, when there are new arrivals of goods or sales promotion, these customers will be notified, so that they can enjoy the priority in purchasing the goods. When the trade first started to provide these services, it has never crossed their mind that these data would be disclosed to others because every company would strive to protect their customers' information against other competitors. Later, many companies started to collaborate with banks to offer priority special-discount promotions to customers who have applied for certain company-affiliated credit cards or certain banks' credit cards. Still, the customers were very confident that their personal data would only be used by the banks and the affiliated companies. The retail trade has never thought that such data are valuable and can be resold for profits.

Perhaps because of this reason, we were rather simple-minded when we asked for customers' consent to use their personal data; we would only add a clause in the application form, asking them whether they agree that their personal data will be used for receiving other promotional materials. In the wake of the ORL reselling its customers' information, we no longer think in the same way.

With the advance of technology, the so-called decryption technology has also improved. People with ulterior motives can retrieve a lot of information from a little personal data, exposing your personal privacy in the virtual world of the Internet. Hence, protection of personal data should be enhanced in tandem with technological advancement. The convenience brought by technological advancement comes with a price.

Members of the retail trade are of the view that protection of personal data needs to be enhanced. If personal data is used for other purposes, prior consent should be sought from the data subjects. Hence, the retail trade, including the Direct Selling Association of Hong Kong Limited, supports the amendments to be introduced to the PDPO.

However, I think the Government is not vigilant enough to learn from past experience. In the beginning, I said that the Government had insisted on adopting the existing practice even at the time of tabling the Blue Bill; that is, if a person does not explicitly voice his dissent, it shall be deemed that he consent to

release his personal data. This approach is inappropriate because many people will argue that they have never indicated their consent, that is to say they do not agree with the arrangement. In order to avoid future disputes, we fully support the view of the Office of the Privacy Commissioner for Personal Data; that is, explicit consent must be sought from the data subjects. We welcome that the Government has ultimately included this point in its Committee stage amendments.

As for some Members' suggestion that audio recording should be made a statutory requirement, frankly, this is unrealistic to the retail trade, either in respect of costs or data checking because it is easier to store and check the written form of the data. Hence, I hope that colleagues can be more pragmatic in putting forth their views and think more from the perspective of the stakeholders because not everything that they can think of is feasible.

With these remarks, I so submit and support the Bill and all the amendments to be moved by the Government. Thank you, President.

PRESIDENT (in Cantonese): Does any other Member wish to speak?

MR KAM NAI-WAI (in Cantonese): President, as indicated by many colleagues this morning or last week, and I am also of the view that the disclosure of the incident that Octopus Holdings Limited sold the personal data of customers for profits has led to the submission of the Personal Data (Privacy) (Amendment) Bill 2011 (the Bill) to the Legislative Council today, with the intent of enhancing the protection of the privacy of the public. Probably Members are very familiar with the incident already.

Nevertheless, the Government has all along lacked sincerity in protecting the privacy of the public. The Office of the Privacy Commissioner for Personal Data, Hong Kong (PCPD) had proposed over 50 amendments to the Administration as early as 2007. However, the Government has all along adopted delaying tactics. It was not until 2009 that the Government issued a consultation document. After the Octopus incident came to light in 2010, the inadequacy of the Personal Data (Privacy) Ordinance (PDPO) has been revealed. As a matter of fact, the PCPD is a "toothless tiger". It is only until then that the

Government has taken further actions and made further efforts. On 18 October 2010, the Government published the consultation report and invited the public to submit views on the legislative proposals to protect personal data privacy. It was about a year ago, in July 2011, that is last July, that the Bill was introduced by the Government. After a period of almost one year, the Government manages to push through the completion of the legislative process of the Bill in the last few days of this Legislative Session.

In the course of this legislative amendment exercise, the Democratic Party must point out that many issues have yet to be addressed. First of all, we hold that this is a very conservative Bill. The principal object of the Bill is solely to solve the pressing need, hoping to address the public's discontent of being disturbed continuously by direct marketing calls. As a matter of fact, I receive direct marketing calls almost every morning. I believe Members present or those watching the television now have also received many such calls. Regarding the protection of personal data privacy, many major issues and some important recommendations proposed by the Privacy Commissioner for Personal Data (the Commissioner) and stated in the consultation document have not been addressed by the Bill.

Let me cite some examples. The Yahoo incident is a case in point. On the eve of the 15th anniversary of the 4 June incident, the Chinese Government released a document to the media in China, stating that memorial activities should be forbidden. SHI Tao, a Mainland reporter, sent the message abroad via his Yahoo! China email account, so that foreign countries would learn about the relevant information of pro-democracy figures in the Mainland. By April 2005, Mr SHI Tao was found guilty of illegally divulging state secrets to foreign entities outside China by the Hunan Changsha Intermediate People's Court. He was sentenced to 10 years' imprisonment. The verdict of the Court claimed that the information related to the IP address to which Mr SHI Tao sent his email was provided by the Yahoo! Holdings (Hong Kong) Limited to the investigative authorities in China. The relevant information later became the clues for the Mainland authority in the investigation of the case, as well as the evidence for Mr SHI Tao's conviction.

Follow-up actions on this incident were taken up in Hong Kong later on. However, the Commissioner and the Administrative Appeals Board held the view that the protocol and the log-in information of Internet disclosed by Yahoo did not constitute personal data within the definition of the PDPO. Nevertheless,

when IP address and other identifiable personal data such as email address are available, the person who sends the email can be ascertained and traced indirectly. As we can see in the case of Mr SHI Tao, according to the PDPO, Yahoo had neither breached the laws nor infringed on personal privacy. But we remember in a United States Congress hearing, Mr Jerry YANG, the Chief Executive Officer of Yahoo, had to offer a public apology.

After following up on the Yahoo incident, the PCPD had put forward a proposal of whether IP address should be deemed as personal data for the consideration of the Administration. The PCPD proposed that a public consultation exercise should be conducted on these issues. Unfortunately the proposal was not accepted by the Administration on the grounds that if IP address was deemed personal data, it would place an unreasonable burden on and pose serious compliance problems to those in the information technology industry. As IP address is the most important and sensitive issue, the Democratic Party expresses dissatisfaction that this issue has not addressed by the Bill. Proposals of amendment have not been put forward in the consultation document. I query whether the Government has to count on the support of the Internet ……

(Mr WONG Yuk-man stood up)

PRESIDENT (in Cantonese): Mr KAM, please hold on.

MR WONG YUK-MAN (in Cantonese): President, I earnestly request you to summon Members to the Chamber.

PRESIDENT (in Cantonese): Clerk, please ring the bell to summon Members to the Chamber.

(After the summoning bell had been rung, a number of Members returned to the Chamber)

PRESIDENT (in Cantonese): Mr KAM Nai-wai, please continue.

MR KAM NAI-WAI (in Cantonese): President, I mentioned the problem of IP address just now. The Democratic Party expresses dissatisfaction that the Bill has not included IP address as personal data. Of course, as the Government counts on the Internet service providers' co-operation and provision of information, it has not included IP address in the Bill. The Democratic Party is greatly disappointed.

Mr WONG Ting-kwong and other Members have mentioned the information related to biometric data, such as iris characteristics, palm prints and fingerprints, which are sensitive personal data that cannot be abolished or changed. This is another issue which has not been addressed. During the first round of consultation, there were proposals to classify these personal biometric data as sensitive personal data, provide them with more stringent protection, and limit the handling of sensitive personal data to specified circumstances. Unfortunately, the Bill has practically not followed up on this issue. Basically, it has not differentiated the handling of personal data that are sensitive from those that are not.

Following a spate of personal data leakage incidents among public and private organizations, in which personal data were disseminated on the Internet and easily accessed by people through the use of software, there has been widespread concern in the community regarding how the problem of personal data leakage can be addressed expeditiously, so that the data subjects will not suffer damages. In the United States, 46 states have already formulated a mandatory privacy breach notification. Canada is also inclined to adopt a mandatory privacy breach notification in relation to personal data leakages.

When the Government was conducting consultation on the amendments of the PDPO, the Democratic Party had proposed that the Government should implement a mandatory privacy breach notification. In the light of a privacy breach notification on the impacts of various sectors, it is advisable that the Government should draw reference from the experience of the United States, under which sectors are categorized in accordance with the level of risks, such as high, medium or low risks. First of all, sectors involving high risks of personal data — such as the banking and finance sectors — will be targeted for the implementation of a mandatory privacy breach notification; with subsequent implementation in sectors of lower risks by phases. Unfortunately, we have to emphasize once again — this issue has not been addressed by the Bill.

It has been mentioned just now that issues related to IP address, biometric data, as well as the privacy breach notification have not been addressed by the Bill. On discussing the Bill, everyone talks about the Octopus incident, with the major focus on how to address the problem of direct marketing. Probably the Administration is worried that the long title of the Bill will be too long, thus it has narrowed the scope of the Bill to which Members can move amendments.

As we all know, the Octopus incident in 2010 had revealed that there have been circumstances when personal data of individuals are resold for profits without the data subjects being aware of it. The data may include names, addresses, dates of birth, identity card numbers, as well as telephone numbers. We were indeed furious. As many colleagues had mentioned the incident, I am not going to repeat the details now. Apart from the Octopus incident, very often, personal data of customers are also sold by banks. In August 2010, another five banks had been revealed of selling massive personal data of customers for profits. The Hong Kong Monetary Authority had also disclosed that six banks had been re-selling personal data of customers.

Very often, we receive calls from finance companies, asking if we need a loan; or from insurance companies, asking if we need to take out various insurance policies. It is likely that banks have resold the personal data of customers to these companies for profits. As we all know, regardless of whether it was the Octopus incident, or banks selling personal data, relevant debates had been held in the meetings of the Legislative Council in 2010. The relevant motions had also been passed. I believe the whole procedure had aroused a lot of public concern.

Be it the Octopus incident, or the leakage of personal data by banks, in fact, as Mr James TO mentioned when he spoke last week, the most controversial part in debates held by the Legislative Council or debates on the Bill was the "opt-in" and "opt-out" mechanisms. We are dissatisfied with the current approach adopted by the Government. Relevant amendments have been proposed by Mr James TO on behalf of the Democratic Party.

Apart from the issue of "opt-in" and "opt-out" mechanisms, we have also pointed out that some other controversial issues have not been addressed in the Bill. In the course of scrutiny, another provision which makes us feel worried is

clause 13 of the Bill which amends section 20 of the PDPO in relation to the secrecy provisions. The provision specifies that under this or any other ordinances, the data user is entitled not to disclose the relevant data, or shall refuse to comply with a data access request.

The Bill has not specifically set out all ordinances under which compliance with a data access request is prohibited or refusal to comply with a data access request is allowed. The provision specifies that the right for a data subject to access his own personal data should be subject to the non-disclosure/secrecy requirements in other ordinances. This is an issue of principle. Privacy is a human right protected under the International Covenant on Civil and Political Rights. Without differentiating the significant from the insignificant, the Administration is allowing all provisions in law to override the provision of data access in the PDPO. The status and the importance of the PDPO are virtually derogated.

In the meetings of the Bills Committee, Mr James TO of the Democratic Party had proposed to the Government to conduct studies into various laws, list out all relevant legal provisions and compared them to the provision of data access in the PDPO. Upon weighing the pros and cons, the Government can then decide whether the overriding status should be given. Unfortunately, the Government has not accepted the relevant proposal.

During the two rounds of public consultation in 2009 and 2010, the Government had invited the public to express their views on these amendment proposals. The majority of the submissions agreed to the views of the Government. The Democratic Party agrees to these proposals in principle. However, we are concerned about certain ordinances granting rights to certain organizations of not disclosing personal data. We opine that the Administration should provide specific information so that the public will be given a chance to hold detailed discussions on this.

All in all, with respect to this Bill, firstly, it has been perceived as a "toothless tiger" by some people. Moreover, there are some issues which have not been addressed. Some amendments have been proposed by Mr James TO of the Democratic Party. However, constrained by the long title, he cannot move

some amendments. We hope that the Government will pay special attention to these aspects in the future.

I so submit.

PRESIDENT (in Cantonese): Does any other Member wish to speak?

MS EMILY LAU (in Cantonese): President, I speak in support of the resumption of the Second Reading debate on the Personal Date (Privacy) (Amendment) Bill 2011 (the Bill). As Mr KAM Nai-wai and other Democratic Party members have just said, the Bill fails to respond to the requests of the people for protection of privacy and personal data. The Bills Committee has scrutinized the Bill for a long time, and members of the trade have expressed many concerns. As other Members have said, the Administration seems to care more about addressing the concerns of the trade than striving to protect the privacy of the people. In this regard, I hope the incumbent and in-coming Governments can pay more attention to it. The Octopus incident has shocked the whole community in that such a well-known corporation could have committed such wrongdoings. People were originally kept in the dark, not knowing that their personal data had been sold to third parties. And the authorities concerned stalled on taking actions after the outbreak of the incident.

President, some colleagues have opined that the Privacy Commissioner for Personal Data (the Commissioner), Mr Allan CHIANG, had put in time and effort on the Bill, and I do not deny that. As a matter of fact, during the scrutiny of the Bill, the Commissioner has discussed with members of the Democratic Party for a number of times. However, we still have a concern about the Commissioner being an ex-civil servant. It is indeed a cause of concern that an ex-civil servant is appointed to head such an important statutory body. President, as you should be aware, I have repeatedly pointed out that in the past years when the Administration submitted reports to different committees concerning human rights under the United Nations on Hong Kong's progress in implementing human rights affairs, these committees urged the Administration to establish an independent human rights committee to monitor the authorities in implementing the requirements under different conventions. However, the Administration

rejected such a need every time, explaining that similar measures, mechanisms and organizations are already in place in Hong Kong and one of which is the Office of the Privacy Commissioner for Personal Data (PCPD), apart from the Equal Opportunities Commission (EOC) and the Office of The Ombudsman.

Given that the three aforesaid organizations are headed by ex-civil servants, how can we be convinced that the system is independent and objective? In September this year, the Administration will go to the United Nations again to present its first report submitted under the Convention on the Rights of Persons with Disabilities. I believe the committee concerned will again make the same request and the Administration will again fend it off with the same reason. I thus call on the Administration again that the organizations mentioned above be headed by candidates who are independent, capable, competent and trustworthy. Perhaps Members may query whether Mr CHIANG's performance is that disappointing. I believe he can do better and we must give this warning. It has been mentioned that the performance of Mr LAM Woon-kwong, Chairperson of EOC, is outstanding. This may be true, but this may also be attributed to the fact that his predecessor's performance was just too disappointing. The point is, apart from civil servants, are there no other reputable people who are competent, independent and objective to take charge of these organizations? This question is worthy of consideration by the Administration.

Speaking of the PCPD, President, as you may be aware, it was reported yesterday that 27 employees had left the PCPD since Mr CHIANG took office in August 2010, including his right-hand man. Considering that the PCPD has only some 60 to 70 employees, the staff wastage rate is very high. While we are concerned of the high wastage rate of the PCPD, we are also worried that given the increasing workload of the PCPD after the passage of the Bill, whether it has sufficient support to discharge the duties independently and objectively. This is a problem the Administration has to deal with.

President, I believe you must remember how the former Commissioner, Mr Roderick B WOO, voiced his grievances when he attended a meeting at the Legislative Council, saying that he often had to ask favours from friends in order to conduct investigations. Have you ever heard of something as disgraceful as this? As the Commissioner, he had to go about asking favours. Eventually, he would be out of favour with his friends. How could such practice be feasible? That is why he could not serve for another term of office despite his hard work.

At that time, rumour had it that there was one short to make up a trio. What do I mean by that? As the two other organizations I just mentioned are already headed by ex-civil servants, the post of the Commissioner would thus be taken up by an ex-civil servant as soon as it was vacated. Sadly, this turned out to be the case.

Thus, it is of paramount importance for the Administration to make these organizations discharge their duties in an independent and objective manner. If the helmsman post is taken up by an ex-civil servant, the image of the organization will be seriously undermined, no matter how outstanding the helmsman's performance is. Besides, in terms of resources, I hope that the Administration can provide sufficient resources, so as to put the staff wastage problem of the PCPD under control. President, I notice that the PCPD claimed that it already looked into its staff wastage problem, adding that exit interviews have been arranged since October 2010, that is, interviews would be conducted for every departing employee. According to the PCPD, most of the employees resigned to take up a higher post with better pay and promotion prospect. This is understandable, but nevertheless, the problem still needs to be addressed.

Hence, we hope that the PCPD can attract and retain high-calibre talents to continue to serve the office. President, actually, this is also the goal of our Members' office for years. Regrettably, we still fail to meet the goal. As for the PCPD, it should be given sufficient resources for retaining and attracting high-calibre employees.

President, regarding the contents of the Bill which colleagues have mentioned, I believe the main problem now is about regulating direct market companies from selling personal data to third parties. I hope members of the trade can understand that these personal data are not their property, and the data belongs to the data subjects. However, there are numerous companies engaging in direct marketing trade and their businesses are booming. I have once raised a question in a past meeting on the possible impacts to the trade when more stringent regulation would be enforced after passage of the Bill, given that I also hope that Hong Kong can have a good business environment. At that time, the Administration and colleagues representing certain industries, including Mr CHAN Kin-por, said that some companies had closed down or were on the verge of closure because they might not be able to survive under the new regulatory measures. Nevertheless, as the saying goes, "when one cock is dead, another

one crows", I believe business opportunities will continue to pop up even if this one is gone. The trade may just need some extra efforts. If direct marketing is truly a lucrative trade, I trust the commercial sector will be more than willing to invest their money on it. That said, the commercial sector should understand that the personal data of the people of Hong Kong should be protected.

Initially, the Administration proposed the adoption of an "opt-out" mechanism in the Bill, saying that this approach has been adopted by many overseas countries. Under this mechanism, as long as a data subject does not voice his objection, this will be regarded as his consent to let a third party use his data. Many Members as well as the Commissioner consider that the protection rendered by the "opt-out" mechanism is inadequate and an "opt-in" mechanism is proposed instead, meaning that a data subject has to expressly indicate his acceptance to let a third party use his personal data. Some business operators regard this mechanism too troublesome, saying that they have already sought the verbal acceptance of their date subjects to use their data. However, we do not think seeking verbal acceptance is enough. Regarding the proposal of using audio recording, we are of the view that for cases with verbal acceptance secured, the optimum arrangement would be requiring data users to seek additional consent in writing from data subjects for using their data.

However, the Administration considers this approach too complicated. I agree that sometimes a balance needs to be struck, and I earnestly believe and hope that the trade can continue to operate. However, I believe that by now the Administration and the trade both recognize the need to protect people's personal data. While some people do not mind releasing their personal data, as they may wish to support the commercial sector and receive their information, if a set of sound regulatory measures can be formulated, thus facilitating receipt of information by the public as well as viability of the trade, why should such measures not be adopted?

I hope the Administration and the commercial sector can understand that the people of Hong Kong wish to adopt such practices. When Mr Roderick B WOO was the Commissioner, he reminded us that not many places in Asia have appointed a Commissioner, a fact he discovered when he attended international conferences. As the Government's restructuring proposal is under discussion, perhaps the Secretary can also give a reminder to us on this subject. According to Mr WOO, Hong Kong is already more advance in this regard. Nevertheless,

we should not only strive to be on a par with other Asian places, but also with the international community. Hence, we still need to strive harder in this regard.

Mr KAM Nai-wai has just mentioned the Yahoo incident, which concerns clause 24 of the Bill, regarding the requirement of the Commissioner to make disclosure to authorities outside Hong Kong. It was an unhappy incident, and Mr Albert HO even made a trip to the United States to offer help to SHI Tao. It grips our heart to learn that SHI Tao was sentenced to 10 years' imprisonment. After deliberation, the Administration agreed to tighten the conditions on making disclosure of personal data to authorities outside Hong Kong. For instance, such authorities outside Hong Kong must be abided by the secrecy requirements; they must have legislation on protection of personal data, similar to the legislation in Hong Kong, in force; and the data subject must have consented to the disclosure and that the disclosure is meant for the avoidance of adverse action against the data subject. The Administration also told us that the authorities outside Hong Kong which are able to satisfy these conditions are mostly developed countries and disclosure would probably be made to these authorities only. Nevertheless, we have also requested the Administration and the related parties to exercise extra caution in handling this matter.

The next clause is related to me, which is related to my case vs the Hong Kong Branch of the Xinhua News Agency which I initiated pursuant to the Personal Date (Privacy) Ordinance (PDPO) for its refusal to respond to my data access request. In other words, it is about clause 28 of the Bill. It happened before the handover when the PDPO was already enacted. In 1996, I wrote a letter to the Hong Kong Branch of the Xinhua News Agency, enquiring whether my personal data were kept by them. Pursuant to the PDPO, a data user is required to comply with a data access request not later than 40 days after receiving the request. I approached the then Director of the Hong Kong Branch of the Xinhua News Agency, Mr ZHOU Nan, but I received no response until the following year, that is, after the handover of sovereignty, replying that they had no record of my personal data. With the assistance of Mr Christopher CHAN, the President of Law Society of Hong Kong, I initiated a prosecution against the Hong Kong Branch of the Xinhua News Agency, which, by then, was already restructured as the Liaison Office of the Central People's Government in the Hong Kong Special Administrative Region (LOCPG). The LOCPG certainly voiced an objection and its Director then, Mr JIANG Enzhu, filed a judicial review,

allegedly claiming that I abused the judicial procedure. In the end, I lost the case.

I thank the public for supporting me in this incident, making it possible for me to raise $1 million-odd to repay the LOCPG. The LOCPG acted imperiously at that time, turning down my request for making the $1 million-odd payment by instalments. Later, it even applied to the Court for my bankruptcy. If I went bankrupt, I could not continue to be a Legislative Council Member. At that time, I raised funds from the public, and I must thank them again for their donation which made it possible for me to repay the LOCPG.

At present, slight amendments are proposed to this clause. A data user is still required to comply with a data access request not later than 40 days after receiving the request; and should he fail to comply, he is liable on conviction to a fine of $50,000 and an imprisonment for two years. If the offence continues, the data user will be liable to a daily penalty of $1,000. On a second conviction, the data user is liable to a fine of $100,000. Although a pecuniary penalty is put in place, it cannot ease my concern because the PDPO is not applicable to the LOCPG. I have followed up this matter for 10-odd years, questioning why the PDPO was applicable to the Hong Kong Branch of the Xinhua News Agency before 1997, but not to the LOCPG after 1997. Why can the LOCPG be above the law, despising law and order altogether? Regarding this subject, I do not know how much longer the Administration will take to ask Beijing. HU Jintao will be coming to Hong Kong this Friday, President, would you please ask him on our behalf why offices of the Central People's Government in Hong Kong do not need to comply with the laws of Hong Kong?

MR ALAN LEONG (in Cantonese): President, on behalf of the Civic Party, I speak in support of the resumption of the Second Reading debate of the Personal Data (Privacy) (Amendment) Bill 2011 (the Bill).

President, I must admit that the Bill is better than the existing ordinance, but ……

(Mr James TO stood up)

MR JAMES TO (in Cantonese): A quorum is not present.

PRESIDENT (in Cantonese): Clerk, please ring the bell to summon Members to the Chamber.

(After the summoning bell had been rung, a number of Members returned to the Chamber)

PRESIDENT (in Cantonese): Mr Alan LEONG, please continue.

MR ALAN LEONG (in Cantonese): President, the Personal Data (Privacy) (Amendment) Bill 2011 (the Bill) under deliberation now is certainly better than the existing Cap. 486, but it is still far from ideal in protecting personal privacy and data. The Civic Party thus thinks that the amendments made this time are too conservative.

President, I am sure you know that the Office of the Privacy Commissioner for Personal Data has already prepared a detailed report on how to perfect the existing system on protection of personal data privacy. The former Privacy Commissioner for Personal Data (the Commissioner), Mr Roderick B WOO, had also made many proposals when he was in office.

The Bill, however, has not addressed issues which Members have just mentioned, such as the Internet Protocol Address, biometric data, or empowering the Commissioner to conduct independent investigation, which the Commissioner so requested. Besides, the Commissioner has proposed that different approaches be adopted in handling the use of personal data for direct marketing and the sale of personal data to third-party marketing (that is, an "opt-out" mechanism for the former and an "opt-in" mechanism for the latter), but the Administration did not adopt his proposal either.

Hence, although this Bill will make a stride forward in the present mechanism on the protection of personal data privacy, the stride is not forward enough. The Civic Party hopes that the Bill can be further improved when future reviews are conducted.

President, this Amendment Bill is certainly sparked by the Octopus incident. President, I believe even you have received unwanted cold calls. As long as we leave the mobile phone on, we will receive such annoying calls, no matter we are in Hong Kong or abroad. The case of the Octopus incident is even more infuriating. The Octopus Holdings Limited (OHL) not only used its clients' personal data for its own marketing activities, but also sold the data to third parties for profits. The incident has raised people's hackles. Hence, the incident is the last straw that has triggered the need to improve the mechanism on the protection of personal data privacy.

As reflected by the Octopus incident, there are four major inadequacies in the present mechanism.

First, in purchasing a certain service or registering for provision of a certain service, customers are often asked to give "bundled consent". Even if customers are uncertain of which part of the contract is directly related to the receipt of the service or the provision of the service, they are left with no choice but to give their bundled consent to the data users. Besides, the fact that some authorization clauses are mingled in the numerous terms and conditions of the contract that customers may have given their uninformed authorization to data users for using their personal data for direct marketing, or even for selling their data for third-parties direct marketing. Moreover, the font size of such written authorization is so small that one cannot clearly read the words even with the help of a magnifying glass.

The Octopus incident has brought to light another problem, that is, data users are not required to obtain prior consent from data subjects for using their personal data, nor are they required to issue specific notification to customers, informing them the purpose of using their data. Certainly, the incident has also brought to light the fact that these contracts often fail to inform data subjects of what their personal data will be used for.

Lastly, even if data users have used the personal data without prior consent from data subjects, data subjects or even the Government cannot bring the data users to justice because violation of the data protection principles is not a criminal offence.

In fact, the Bill has put forth legislative amendments to address these concerns.

President, during the scrutiny of the Bill, the Bills Committee has spent considerable time on discussing whether it is more appropriate to adopt an "opt-out" mechanism or an "opt-in" mechanism. Under an "opt-out" mechanism, data subjects can choose not to allow data users to use their personal data, while under an "opt-in" mechanism, it is incumbent upon data users to obtain consent from data subjects before the use of their personal data. During the scrutiny, we have spent a lot of time on how to strike a balance between businesses efficacy and protection of personal data privacy. Clause 21 of the Bill, which proposes a new Part VIA, precisely seeks to strike that balance.

However, in the beginning when we discussed whether we should adopt an "opt-out" mechanism or an "opt-in" mechanism, we were rather surprised to find that the Government is biased towards businesses efficacy, despite saying that a balance has to be struck. President, why do I say so? It is because an arrangement was originally provided under the Bill, that is, if no reply indicating objection is sent within 30 days, the data subject is taken not to object to the use of his personal data by the data user for direct marketing or to the transfer of his personal data to others for direct marketing purposes.

We were astonished at the arrangement. Even members who support the "opt-out" mechanism and attach great importance to business environment felt strange, not knowing why the Government would take such a biased stand. Fortunately, our persistence has persuaded the Administration to readily propose a Committee stage amendment to replace the "taken not to object if no reply sent within 30 days arrangement" with another mechanism. According to the new mechanism, data users are required to obtain prior consent from data subjects through logical and comprehensible means before using their personal data for direct marketing or providing the data to others for use in direct marketing. The amendment is better than the original arrangement provided in the Bill.

Moreover, regarding the provision in the Bill which allows the Commissioner to disclose to authorities outside Hong Kong information obtained from investigating or handling personal privacy matters, the Bills Committee has also spent considerable time on discussing this issue as it is also a concern to us.

During the scrutiny of the Bill, members of the Bills Committee have mentioned a number of times the Yahoo incident, so did Members just now. The Administration subsequently took a further step in this regard and proposed an amendment to the Bill, requiring that the Commissioner may only disclose information to authorities outside Hong Kong which have privacy protection arrangements, similar to those in Hong Kong, in force. Besides, the Commissioner is empowered to lay down additional conditions, requiring authorities outside Hong Kong seeking information from the Commissioner to be bound by these conditions. The amendment is an improvement.

President, in the last few minutes, I wish to discuss the five amendments proposed by Mr James TO to the Bill. The Civic Party queries why the five amendments have to be debated jointly. President, we understand that if we wish to pledge our support to Mr James TO's amendments, the Secretary's amendments put forth on behalf of the Administration would have to be voted down before we will have a chance to vote on Mr TO's amendments.

However, we are in a dilemma, as I have just said, although the Secretary, after considering our persistence, has proposed amendments to improve the Bill, the amendments still have inadequacies. Hence, the Civic Party inclines to support Mr James TO's amendments because we find Mr TO's proposed amendments very reasonable. Under such a circumstance, we are left with no choice but to vote against the Secretary's amendments. However, if the Secretary's amendments are vetoed and Mr TO's amendments are not passed, everything will be back to square one; that is, we are left with the Bill which contains clauses we find unacceptable. That is why we are in a difficult position.

However, as the President has already decided on the voting arrangement, despite the difficult position that we are in, we will strive to do our best. We will wait and listen to the Secretary when he later speaks at the Committee stage and see if the Administration has raised any views which will change our mind. However, up till this moment, the Civic Party inclines to support the amendments proposed by Mr James TO because we think that his amendments can further plug the loopholes of the Bill, particularly about the transitional arrangement. We have learnt during scrutiny at the Bills Committee that even if the Bill is passed today, there will still be considerable time before the new arrangement is in force. During the transitional period, data users who possess personal data of

data subjects can use the data for direct marketing and such direct marketing activities can be exempted from the regulations to be established under the system. We are concerned about this point and hope that the Secretary can later respond to it when he speaks.

With these remarks, I so submit and support the resumption of the Second Reading of the Bill.

MR CHAN KIN-POR (in Cantonese): President, direct marketing is very popular around the world. In Hong Kong, tens of thousands of people are engaged in direct marketing and related trades. Generally, people who have attained secondary education level can join the workforce. The working hours are flexible, as people can work full-time or part-time, and the longer hours they work, the more they earn. Thus, apart from employing full-time workers, many housewives and persons with disabilities are also employed, providing many job opportunities for people who wish to make a living but are unable to work full-time.

Besides, hundreds of thousands of transactions are concluded annually through direct marketing, covering a large variety of products, which include the financial, insurance, telecommunications and personal consumption commodities. These products are typically a bargain buy and cater to the needs of different clienteles, making an annual turnover over of hundreds of millions of dollars. This proves that the direct marketing trade is instrumental in creating job opportunities in Hong Kong and providing more choices for consumers, particularly the general public.

In the wake of the Octopus incident, the Government decided to tighten regulation on the use of personal data by the direct marketing trade. In my opinion, the Bill proposed by the Government has already struck a balance between protecting personal data privacy and giving leeway for the direct marketing trade. The Bill is worth supporting.

I will now focus on the "opt-in" and "opt-out" mechanisms. In fact, most countries in the world, including Europe and the United States which attach great importance to personal data privacy, have adopted an "opt-out" mechanism in

regulating direct marketing activities. One of the biggest reasons is that their overseas experience proves that an "opt-in" mechanism will strangle the direct marketing trade and negatively impact on consumer choices. Hence, after listening to the deliberation given by organizations representing different direct marketing trades, the Government maintained its position of adopting the "opt-out" mechanism. As a matter of fact, Hong Kong does not need to surpass the United Kingdom or the United States and leap to the top of the world because, by so doing, we will strangle the honest and law-abiding direct marketing companies.

A Member said earlier that the use of personal data for profit-making should be banned by the Government, as if saying that the direct marketing trade is some sort of improper business. However, the reality is that the Government is making every effort to regularize the direct marketing trade, only allowing the trade to use their clients' personal data for direct-marketing purposes if their clients indicate no objection; besides, their clients can stop data users from using their personal data anytime. Data users will commit a criminal offence if they fail to comply with the law. Hence, if Hong Kong pays no regard to the reality or what is happening around the world, it will only strangle the survival of the honest direct-marketing companies.

However, we all know that there is a market need for direct marketing. Ruining the honest direct-marketing companies will only encourage the birth of non-complying modes of business operation which evade privacy protection law, such as by making cold calls in Macao or in the Mainland, or pretending the direct-marketing calls to be generated by random sampling. In the end, the public will be subjected to more disturbances. Actually, according to my personal experience, if I told the direct marketing companies not to call me again, I would receive much less cold calls. However, recently, I have received an increasing number of cold calls and the callers claimed that they obtained my phone number by random sampling. This shows that regularizing the honest direct-marketing companies will only encourage the birth of non-complying activities.

Another point I wish to raise for discussion is that the Government has proposed an amendment to accept verbal consent as an authorization for the use of personal data for direct marketing. A characteristic of the direct marketing

trade is that the products are often easy and simple to understand. As the amount of money involved in each transaction is small, the mode of operation is simple and the operation cost is low. Hence, in general, the entire transaction can be concluded over the phone and the customer does not need to sign any document.

How can customers be protected under this mode of operation? They are at least protected in two ways. First, most direct marketing companies are equipped with a digital telephone recording system to safeguard the interests of the companies and the customers. Should any queries arise, they can immediately listen to their conservation recorded during the transaction process and the truth can be revealed immediately. As a matter of fact, after the Lehman Brother incident, the Hong Kong Monetary Authority requires banks to make audio recording of the entire selling process when they sell financial products, so as to sort out the liability. Second, if a transaction involves a contract, such as an insurance policy, the direct marketing company will inform the client in writing by fax or electronic means. Actually, this practice has been adopted for years around the world and is accepted by consumers worldwide.

The Government is willing to accept our views and adopt verbal consent as an authorization. It further proposes that prior to the use of local personal data for direct marketing, data users must confirm in writing with the data subjects within 14 days from the date of receipt of their consent. This shows that the Government has made an effort to safeguard the consumers and to address our concern about protecting the personal data of consumers.

Mr James TO has proposed several amendments. Regrettably, I am afraid his amendments will only further complicate the operation of the honest direct-marketing companies, thereby increasing their costs or even threatening their survival. As I have just said, if the honest companies are regularized, the non-complying direct-marketing companies will start to breed, and the regularization, in practice, cannot strengthen consumer protection. Hence, I cannot support the amendments.

With these remarks, I so submit.

PRESIDENT (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

PRESIDENT (in Cantonese): If not, I now call upon the Secretary for Constitutional and Mainland Affairs to reply. This debate will come to a close after the Secretary has replied.

SECRETARY FOR CONSTITUTIONAL AND MAINLAND AFFAIRS (in Cantonese): President, first of all, I would like to take this opportunity to thank Dr Philip WONG, Chairman of the Bills Committee on Personal Data (Privacy) (Amendment) Bill 2011 (the Bills Committee) and other members for their effort over the past months to scrutinize in great detail the Personal Data (Privacy) (Amendment) Bill 2011 (the Bill).

The Bills Committee has held a total of 16 meetings and received views from deputations at two of these meetings. In the course of scrutiny, members have put forward many valuable opinions and proposals. We have then proposed a number of amendments in order to perfect the regulatory mechanism and improve the relevant provisions.

The Personal Data (Privacy) Ordinance (PDPO) came into effect in 1996. In the light of developments over the past 10 years and more, the Government, with the support of the Privacy Commissioner for Personal Data (the Commissioner), conducted a review of PDPO and put forward a series of proposals for public consultation in 2009. Subsequently, cases of transfer of customer personal data by some enterprises to others for direct marketing purposes were exposed in society. These enterprises did not explicitly and specifically inform customers of the purpose of the transfer of data and the identity of those the data were transferred to, or explicitly seek customers' consent. In some cases, monetary gains were even involved. As a result, wide public concern was aroused. In view of this, we put forward a number of proposals for the regulatory regime of the use of personal data for direct marketing and the sale of such data in an attempt to provide better protection. And, further public consultation was conducted in 2010. Having carefully

considered the views collected in the two rounds of public consultation, we drafted the Bill and introduced it into the Legislative Council in July last year.

Major proposals in the Bill include: to empower the Commissioner to provide legal assistance to data subjects intending to institute legal proceedings under PDPO to seek compensation from data users; to empower the Commissioner with other new powers and exemptions; to impose a heavier penalty for repeated contravention of enforcement notices; to create a new offence for deliberate repeated contravention of the requirements under PDPO for which enforcement notices have been served; to create a new offence for the disclosure of personal data obtained without the consent of the data user; to introduce new exemptions in respect of certain requirements under PDPO; and to make new provisions relating to the data protection principles. We hope that this will enhance the effectiveness and improve the operation of PDPO.

Regarding the use of personal data for direct marketing and the sale of such data, we have proposed to introduce tighter regulatory arrangements. If a data user intends to use or provide the personal data to others for use in direct marketing, or to sell such data, he should explicitly inform the data subject and provide a response facility through which the data subject may indicate whether he objects to the use of his personal data for such purposes by the data user. It will be a criminal offence in violating the relevant requirements. And, severe penalties will be imposed to achieve deterrent effects.

In scrutinizing the Bill, the Bills Committee has carefully examined the contents of the proposals and the drafting of the provisions, and has put forward many opinions and amendment proposals. Members have expressed special concern about the adoption of the "opt-in" mechanism or the "opt-out" mechanism, and the "30-day arrangement" proposed in the Bill. Having carefully considered the views of deputations of the related industry and members of the Bills Committee, and after further studies, we have agreed to introduce amendments to some provisions. Initially, I intend to give a detailed explanation later at the Committee stage. However, as a number of Members have spoken on these issues during the Second Reading of the Bill and have expressed different views, I wish to respond briefly to some of their major views. Then, I will explain and respond in detail at the Committee stage again.

First of all, when Mr Ronny TONG and Mr LEUNG Kwok-hung spoke just now, they seem to have the idea that according to the latest proposed amendment, if a data subject refuses to allow a data user to use his personal data for direct marketing purposes, he has to ask the data user not to use such data, and not that a data user cannot use such data without the consent of a data subject. I wish to explain about this point. We did have a proposal in the original Bill which provides that after a data user has provided relevant information and a response facility to a data subject, if the data subject does not send a reply indicating his objection within 30 days, it will be taken as no objection from the data subject. This is what we usually call the "30-day arrangement" for short.

We proposed this arrangement at first mainly because we wish to deal with personal data collected before the new requirements come into force. However, having considered the views of the Bills Committee, we now propose to amend the Bill. We will propose an amendment later to provide that a data user can use the personal data of a data subject for direct marketing purposes only when he receives the reply of the data subject to indicate consent or no objection. If a data subject does not reply to indicate consent or no objection, a data user cannot use such personal data for direct marketing purposes. In other words, if the amendment we propose later is passed, the situation Mr Ronny TONG worried about earlier will not occur.

Next, I wish to talk about our proposed "grandfathering" arrangement mentioned by a number of members in the course of scrutiny of the Bills Committee. First, I would like to point out that this proposed arrangement had already been made at the Blue Bill stage. We have also explained in detail to the Bills Committee formed to scrutinize the Bill the reasons why such an arrangement was proposed. I have to admit that when the paper was first drafted, it was in English. And, it was then translated into Chinese. I had gone through the Chinese text before it was released to members. I have to admit that to translate "grandfathering" into "不溯既往" may not be exactly proper or appropriate because the Chinese term gives the impression that someone who had previously committed an offence is now being let off without further actions taken. Therefore, it is different from the arrangement we have proposed at present. And, it is not a very appropriate description. Therefore, in drafting the speech for the resumption of Second Reading of this Bill, I asked my colleagues never to use the term "不溯既往" again to describe the new arrangement. Actually, what we propose now is an exemption arrangement.

This exemption arrangement will only apply under certain conditions. One of the major conditions is that if a data user has used personal data collected before the entry into force of the new requirements in direct marketing without violating any provisions under the PDPO in force back then, the new requirements will not apply when these requirements enter into force in future. Therefore, it does not mean we will continue to tolerate or continue to let off offences in the past.

President, in discussing the provisions relating to direct marketing, some members of the Bills Committee have also expressed concern about the implementation date of these provisions. On the one hand, we, of course, hope that the relevant provisions will enter into force as soon as possible to provide the public with better protection. However, on the other hand, to assist data users in complying with the new requirements, the Commissioner has to discuss with the industry regarding the preparation of detailed guidance notes, and to conduct publicity and education activities on the new regulatory arrangement, such as the organization of workshops for different sectors, so as to enable data users to understand clearly the new requirements and get properly prepared to comply with these requirements. We also need to conduct public education and publicity activities to enable members of the public to be aware that the new regulatory arrangement will provide them with better protection.

It is our aim to have provisions relating to direct marketing implemented around nine months after the enactment of the Bill. I know Members very much hope that these provisions will be implemented as soon as possible. However, according to the initial plan of the Commissioner, it actually took a longer time for these new requirements to enter into force. I have relayed Members' views to the Commissioner a number of times in the hope that the Commissioner can facilitate the implementation of these new requirements as soon as possible. Therefore, we now aim to implement these new requirements around nine months after the enactment of the Bill. And, we will set a suitable commencement date, in the light of the progress of the preparation work. We have also undertaken to report to the Legislative Council Panel on Constitutional Affairs the progress of the preparation work.

Several Members including Mr WONG Kwok-hing, Dr Priscilla LEUNG and Ms Emily LAU have expressed concern about the resources of the Office of the Privacy Commissioner for Personal Data (PCPD) just now and last Friday. I

wish to point out that an additional $7.5 million has been allocated to the Commissioner in the year 2012-2013 for the creation of nine permanent posts to carry out work related to the implementation of the new requirements in the Bill. The creation of new posts can possibly turn the present temporary or time-limited posts into permanent posts, including the posts of Senior Legal Counsel and Senior Personal Data Officer. It is hoped that promotion opportunities will be offered in the PCPD. As Ms Emily LAU mentioned this point earlier, so I give a brief response now.

Besides, we have earmarked funds in the 2012-2013 financial year to enable the PCPD to conduct promotional, publicity and educational work on some new provisions.

Next, several Members, including Mr WONG Kwok-hing, Mr TAM Yiu-chung and Mr Ronny TONG have proposed that the Government should conduct a comprehensive review some time after the passage and implementation of the Bill.

First of all, I would like to thank these Members for their proposals. I believe Members would understand that I cannot make any promises here for the next-term Government. However, I will definitely reflect the views and proposals of Members to the next-term Government. I also believe the next-term Government will closely monitor the situation after the implementation of this new regulatory regime and conduct timely review as required.

As to proposals not included in the Bill, such as the regulatory regime for the use of sensitive personal data (including biological features) mentioned earlier by several Members (Mr WONG Yuk-man, Mr WONG Ting-kwong, Mr KAM Nai-wai and Mr Alan LEONG), and the notification mechanism for the leak of personal data mentioned earlier by Mr KAM Nai-wai, I believe these proposals will be included in the future review.

Mr WONG Ting-kwong has proposed that the Unsolicited Electronic Messages Ordinance should be subject to review. We will certainly refer this proposal to the relevant Policy Bureau.

Ms Cyd HO and Mr KAM Nai-wai have mentioned the amendment to section 20(3)(ea) of the PDPO. I wish to explain about this. At present, under

the PDPO, a data user must comply with a data access request within 40 days after receiving the request. However, at present, secrecy provisions are present in many other ordinances providing for different specific requirements of secrecy.

In the past, the Commissioner had encountered situation when the enforcement of the law will subject some data users to a dilemma. If the data user does not comply with the provisions on data access under the PDPO, he will contravene the PDPO; but if he complies with the data access request, he will contravene the secrecy provisions in other ordinances. Therefore, the Commissioner has advised that the PDPO should specify that in case secrecy provisions are provided in other ordinances, a data user is not required to comply with a data access request under the PDPO.

In the course of scrutiny of the Bills Committee, some members have proposed that relevant provisions in any other ordinances should be specifically set out under the PDPO. However, I have tried to explain that it is impracticable to specify all the ordinances under which compliance with a data access request is prohibited or refusal to comply with a data access request is allowed. I have also reiterated that these secrecy provisions in various ordinances have also been subject to careful legislative scrutiny before enactment. And, when formulating these secrecy provisions, all relevant factors, including not only the need to preserve secrecy, but also the need to respect the data subject's right to access his own personal data, have been taken into account.

When Ms Cyd HO spoke last Friday, she asked whether some general rules would be set out if this was the case. I then went through the papers we had submitted to the Legislative Council again. I also wish to explain about this. As I said earlier, our papers were first drafted in English and then translated into Chinese. Misunderstandings might arise in the process of translation. We have proposed to set out the general rule under the PDPO, that is, if secrecy provisions are provided in other ordinances, a data user is not required to comply with a data access request under the PDPO. Therefore, the general rule mentioned in the papers is actually the new clause we now propose to add to section 20, and that is, if secrecy provisions are provided in other ordinances, a data user is not required to comply with a data access request. The general rule we have mentioned is actually the general clause we now propose to add to the PDPO.

Ms HO also mentioned the proposed new sections 59A(2) and 63C(2) in the Bill. Both of these sections involve provisions concerning a defence. The proposed section 59A(2) in the Bill is intended to provide for a defence for persons who have acted out of good faith. Having considered Members' views, we will move an amendment to delete section 59A(2). The proposal of a defence in section 63C(2) will also be deleted.

President, Mr Ronny TONG and Dr Priscilla LEUNG mentioned in their speeches to empower the Commissioner to institute criminal prosecution, and Mr WONG Yuk-man and Mr Alan LEONG also talked about criminal investigation. On these two fronts, we invited the public to express their views in the past two rounds of public consultation. The views we received are generally in opposition to passing the powers of criminal investigation and prosecution to the Commissioner. The mainstream view is that the existing arrangement of criminal investigation handled by the police and prosecution instigated by the Department of Justice is running smoothly and there is no need for changes. If the powers of law enforcement and prosecution are concentrated in the PCPD, it will have too much power. Instead, the powers of criminal investigation and prosecution should be spread out to different institutions to achieve checks and balances. Moreover, the role of the PCPD also includes assisting data users in complying with the requirements specified in the PDPO. If the Commissioner is empowered to conduct criminal investigation and instigate prosecution, it will possibly confuse the role of PCPD and data users may not dare to approach PCPD for assistance.

In addition, offences specified in PDPO are not of a simple technical nature but involve fines and imprisonment. It may be the concern of the public that if PCPD is to take up criminal investigation and prosecution work, it may need restructuring and additional fund to facilitate better training for its staff to equip them with professional knowledge to take up criminal investigation and prosecution work. Additional resources will then be involved.

At present, the Department of Justice is responsible for the prosecution work of many government departments. And, the number of cases of the PCPD requiring referral to prosecution is not many. Therefore, the Government thinks that it is more appropriate for the Department of Justice to continue to be responsible for prosecution work now.

President, Mr Ronny TONG mentioned in his speech last Friday whether the Commissioner can institute legal proceedings for aggrieved persons in accordance with the PDPO before the implementation of a class action regime. I wish to say that although there is no such proposal in the present Bill, we do have another proposal to empower the Commissioner to provide legal assistance to aggrieved persons when they institute legal proceedings, so as to enable them to claim compensation from data users. We believe this, to a great extent, will help aggrieved persons.

Mr WONG Yuk-man, Mr KAM Nai-wai and Mr Alan LEONG mentioned whether Internet protocol addresses should be regarded as personal data and included in the scope of regulation of the legislation. On this issue, detailed responses were given in the public consultation report in 2010. As I have already spoken for quite some time, I will not go into details.

Regarding Ms Emily LAU's concern about the appointment of the heads of statutory human rights bodies, I wish to reiterate here that the appointments have been made through open recruitment by a selection board comprising public figures to ensure the person appointed is competent for the job.

Ms LAU has also expressed concern about whether the PDPO is applicable to offices set up by the Central People's Government in Hong Kong. Given that matters involved in the PDPO are very complex in nature, the Administration has to spend more time to examine whether the PDPO is explicitly applicable to offices set up by the Central People's Government in Hong Kong. We will inform the Legislative Council once the SAR Government reaches a conclusion about this issue.

President, the Bill and the amendments to be proposed by the Administration have gone through a comprehensive review of the PDPO, two rounds of public consultation and detailed scrutiny of the Bills Committee, which aim to provide better protection for personal data privacy. I implore Members to support the Second Reading of the Bill and pass the amendments proposed by the Administration later at the Committee stage.

President, I move that the Second Reading of the Personal Data (Privacy) (Amendment) Bill 2011 to be resumed. I so submit. Thank you, President.

PRESIDENT (in Cantonese): I now put the question to you and that is: That the Personal Data (Privacy) (Amendment) Bill 2011 be read the Second time. Will those in favour please raise their hands.

(Members raised their hands)

PRESIDENT (in Cantonese): Those against please raise their hands.

(No hands raised)

Mr Albert CHAN rose to claim a division.

PRESIDENT (in Cantonese): Mr Albert CHAN has claimed a division. The division bell will ring for five minutes.

PRESIDENT (in Cantonese): Will Members please proceed to vote.

PRESIDENT (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Dr Raymond HO, Mr LEE Cheuk-yan, Dr Margaret NG, Mr James TO, Mr CHAN Kam-lam, Mrs Sophie LEUNG, Dr Philip WONG, Mr LAU Kong-wah, Ms Miriam LAU, Ms Emily LAU, Mr TAM Yiu-chung, Ms LI Fung-ying, Ms Audrey EU, Mr WONG Kwok-hing, Mr LEE Wing-tat, Dr Joseph LEE, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr CHEUNG Hok-ming, Mr WONG Ting-kwong, Mr Ronny TONG, Mr CHIM Pui-chung, Mr KAM Nai-wai, Ms Cyd HO, Ms Starry LEE, Mr Paul CHAN, Mr CHAN Kin-por, Mr WONG Kwok-kin, Mr IP Wai-ming, Mr IP Kwok-him, Mrs Regina IP, Dr PAN Pey-chyou, Mr Alan LEONG, Miss Tanya CHAN and Mr Albert CHAN voted for the motion.

THE PRESIDENT, Mr Jasper TSANG, did not cast any vote.

THE PRESIDENT announced that there were 36 Members present and 35 were in favour of the motion. Since the question was agreed by a majority of the Members present, he therefore declared that the motion was passed.

CLERK (in Cantonese): Personal Data (Privacy) (Amendment) Bill 2011.

Council went into Committee.

Committee Stage

CHAIRMAN (in Cantonese): Committee stage. Council is now in committee.

PERSONAL DATA (PRIVACY) (AMENDMENT) BILL 2011

CHAIRMAN (in Cantonese): I now propose the question to you and that is: That the following clauses stand part of the Personal Data (Privacy) (Amendment) Bill 2011.

CLERK (in Cantonese): Clauses 2, 5, 6, 10, 12, 14 to 20, 22, 23, 25, 26, 29, 30, 31, 37 and 40 to 43.

CHAIRMAN (in Cantonese): Does any Member wish to speak?

MR JAMES TO (in Cantonese): Chairman, regarding the rules relating to the Court, I wish to talk about prosecution. The Secretary said earlier that the power of prosecution should lie in the hands of the police but not the Office of the Privacy Commissioner for Personal Data (PCPD). Her arguments are as follows.

Firstly, during the consultation period, some people have raised query about the PCPD which is responsible for both prosecution and investigation. I consider this query pretty bizarre. In fact, many government departments have their own manpower to handle investigation and prosecution in their own ways with the given power. Let us not talk about the police, which is responsible for crime investigation. Even for the Food and Environmental Hygiene Department (FEHD) and the Agriculture, Fisheries and Conservation Department, they have inspectors to handle prosecution matters. They can institute prosecutions in accordance with what is commonly known as the "Cats and Dogs Ordinance". For matters relating to food hygiene or street obstruction by hawkers, prosecutions are often, but not always, instituted by the FEHD. In fact, the FEHD would rather take the trouble than leave it to the police.

Will the centralization of the investigation and prosecution functions in a single body give rise to abuse, unfairness or lack of independence? I think it is the usual practice to have one single department tasked to conduct investigation and institute prosecution. Furthermore, according to the Secretary, the offences are pretty technical in nature, it is therefore more appropriate to delegate the prosecution power of these cases to a technical department (that is, the PCPD) which is most familiar with such cases. Why are the police more capable than the PCPD in instituting prosecution, especially in view of the present amendment? If the police are tasked to institute prosecution for such cases, it may have to recruit a group of professionals. The PCPD is, however, handling such cases every day. It is therefore more efficient for the PCPD to handle prosecution cases involving technical crimes.

Another argument suggested by the Secretary is that not many cases have been forwarded by the PCPD to the police every year, so why would the PCPD bother to establish a prosecution unit? This is a waste of time and effort. I wonder if this implies a lack of efficiency or economies of scale. Honestly speaking, it is most appropriate for the PCPD to institute prosecution. What are we complaining then? Although the PCPD only forwarded a few cases to the police every year, the process of investigation is pretty slow and not much progress has been made. The police have not put priority on cases forwarded from the PCPD ……

CHAIRMAN (in Cantonese): Mr TO, which provision are you speaking on?

MR JAMES TO (in Cantonese): Chairman, I am speaking on clause 40 …… No, it should be clause 42, which is concerned with the rules of the Court and prosecution.

Chairman, I think the PCPD has been complaining about the police for not putting priority on the cases forwarded. As for the lack of efficiency or economies of scale, frankly speaking, the police might have to deploy internal staff to handle the specialized cases forwarded to it. For example, officers belonging to the Crime Wing Headquarter may not be able to handle prosecution cases in their division.

Therefore, I hold that if the PCPD is not granted with prosecution power and its *status quo* is maintained, such that prosecution cases must be forwarded to …… to put it rudely, the PCPD has to beg the police to handle the cases; yet, without any expertise in this area, the police might need to train up the relevant staff and even seek the advice of the Judiciary on prosecution. This would inevitably slow down the enforcement action of the PCPD. Looking from another angle, this is unfair to the police. It would be better if the police can focus on hard crimes (such as plundering, killing or setting fire), rather than acting as a last resort for other departments in respect of investigation and prosecution.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR ALBERT CHAN (in Cantonese): Chairman, regarding the series of provisions from clause 2 to clause 43 just read out, as far as I understand, Members have no opposition to these clauses. So, these clauses will be passed. However, I have received views from some members of the public expressing concern about these provisions. I understand that it is not possible to propose any amendments at this stage. However, as some members of the public have expressed their concerns, I wish to take this opportunity to voice my views. Although the Government will not introduce any changes to the legislative amendments, I hope that it will resolve some matters or reflect some concerns and

demands of the public through administrative measures. Chairman, clause 12 of the Bill seeks to amend section 19(2) of the existing Personal Data (Privacy) Ordinance (PDPO) to the effect that a member of the public can request a data user to inform him within 40 days whether the data user holds his personal data.

Chairman, 40 days. I understand that for executive departments of the Government, the longer the time, …… the protection, or the convenience and administrative flexibility given will be greater. Of course, while the requirement is within a 40-day period, the data may be submitted in seven days, 12 days or 14 days. However, regarding the 40-day period, I believe the public may think that the longer the time, the greater the opportunity for the relevant departments to cheat. It is because if time is tight, the relevant departments have to conduct investigation within a short time and give an answer as soon as possible. If a longer time is given, it does provide an opportunity for cheating.

Years ago, I handled a case concerning the provision of false information by a certain hospital in Kowloon East. The person involved in the case claimed that his father had received unreasonable treatment in the hospital. After his father had passed away, he found in his father's belongings left in the hospital that his father had written a note, saying that he had been treated by some medical personnel in an inappropriate and unreasonable manner. Thinking that this might have something to do with his father's death, the person then sought medical record from the hospital, including the doctor's medical record and ward record through normal procedures. The person concerned had to wait quite some time before he received the medical records as the law has not stipulated the time limit for the provision of such record. Therefore, the man had to wait a long time before he received the medical record.

After he had received the record, he read it carefully page by page and found one of the pages …… He found two problems regarding the medical record. First, the signatures of the doctor concerned varied in different parts of the record, suggesting some of the signatures might be faked, as there are no reasons why some signatures were different. Second, the person concerned found that a different type of paper was used in one page of the record. The same type of paper should be used for the whole medical record, …… Of course, what the person got was only the photocopied record but not the original one. However, even from the photocopied record, he could see that the paper of that page (the most important page) was different from that of the previous and

following pages. The person concerned then reported the case to the police. But, as you all know, without the assistance of a senior barrister and certification of an authoritative expert, an ordinary member of the public could hardly lodge a complaint, and the case was dropped in the end. I tried my best to assist that man by finding him a voluntary lawyer who gave him many advices and ……

CHAIRMAN (in Cantonese): Mr CHAN, how is the example you quoted related to the Bill under discussion now?

MR ALBERT CHAN (in Cantonese): Chairman, this relates to the time limit because a 40-day period makes cheating possible. My argument is that the shorter the time limit, the smaller the opportunity for cheating. Of course, a shorter period of time does not mean there is no opportunity for cheating. I quote this example just to illustrate that given a time limit of 40 days, if the relevant department intends to withhold information …… We all remember the "black shadow remark". The "black shadow remark" may also be fabricated, that is, the Commissioner of Police may also cheat. Let us imagine how horrible the current Government is. LEUNG Chun-ying is notorious for cheating. He is an expert in telling lies. Just imagine, if the top echelon of the Government tells a pack of lies, and the Chief Secretary for Administration is also fraudulent.

The whole executive regime and the governance of the whole Government are totally untrustworthy ……

CHAIRMAN (in Cantonese): Mr CHAN, you have digressed from the subject.

MR ALBERT CHAN (in Cantonese): …… give them 40 days, Chairman …… give them 40 days to make things up, how horrible the situation is. Not to say 40 days, only a few days are enough for our Chief Executive to distort and deceive. Therefore, regarding the 40-day period, some members of the public told me their concern.

Moreover, within the 40-day period, some members of the public have worried that — they are ex-civil servants and they raised this issue during our

conversation — some ex-civil servants said to me, if they are going to retire in one month and they receive a data access request, they will sometimes just shelve the request, so that it will be handled by some other people, or some of them will even take leave for two or three weeks. The longer the period …… this is a common practice among government officials. When the work can be delayed, they will always stall and take no action.

Several of our Secretaries of Departments and Directors of Bureaux have exactly behaved that way. For example, Michael SUEN has delayed the Zheng Sheng College incident for three years, which has dragged the College down. Therefore, if civil servants or political accountable officials are given the flexibility, they will never take immediate actions but will for sure keep stalling.

During the transition from the old to the new — like a change of the Government — some old problems will be shelved; or when some information are sensitive which may lead to troubles or complicated conditions, or when people worry that they have to bear responsibility when certain information is disclosed, they will try their best to shelve the issues, leaving them to be handled by their successors. As for the successor, when they first take up the work, they may find the information incomplete and missing …… Sometimes, such a situation will arise, and as the successors know nothing about that, problems will then emerge.

Chairman, people also have views on clause 18 of the Bill, which seeks to amend section 31 of the PDPO by adding section 31(4). The provision concerns committing an offence and "is liable on conviction to a fine at level 3 and to imprisonment for 6 months". Chairman, Members may still remember that during the discussion of other bills a few days ago, I also criticized the Government for having a bias towards white-collar offences. In a bill passed in the Legislative Council a few days ago, though the fine amounts to $10 million, no imprisonment term is imposed. On the contrary, in this Bill today, the fine is just set at level 3, that is, $10,000 only, and yet a six-month term of imprisonment is imposed.

Chairman, the provision stipulates that "supplies any information which is false or misleading in a material particular …… commits an offence". Similar provisions are found in the Immigration Ordinance. If a person makes a false statement, he will be subject to a fine of $150,000 and to imprisonment for a

maximum of 14 years. Some members of the public thus query, as the same offence of making false statement is involved in both cases, why the penalty under the PDPO is only imprisonment of six months and a fine of $10,000, and yet the penalty for the similar offence of making false statement under the Immigration Ordinance is a fine of $150,000 (which is 15 times of the former) and imprisonment for 14 years.

Therefore, many a time, we see that the Government …… Mr James TO is more familiar with the legislation because I did not get involved in the drafting of this Bill nor had I joined the Bills Committee. As some members of the public are more familiar with the PDPO and seeing that the Bill is now at the stages of Second Reading and Third Reading, they want to express their concerns and disagreement on some of the logics adopted in the Bill. Perhaps, as more people have recently watched debates in the Legislative Council on television, they are inclined to express their views in this regard.

This discrepancy in penalty gives people a misconception, making them strongly believe that the Government seems to regard privacy …… that is, to supply false information is not a serious offence but a minor one that can be settled by paying a fine of less than $10,000. When compared with the penalty of imprisonment for 14 years for making false statement under the Immigration Ordinance, the differences are poles apart. Many a time, these penal provisions may reflect the views of the responsible officials on certain issues. The great discrepancies among different legislation are perplexing to the public. It is evident that the sense of value adopted the Government is sometimes different from the aspiration of the people.

Chairman, we understand that the Government will introduce this Bill and we have expressed our concerns about the relevant provisions. When the amendments are put to vote, the two Members in the People Power will abstain from voting.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(Mr Albert CHAN stood up)

MR ALBERT CHAN (in Cantonese): I request a headcount. Thank you.

CHAIRMAN (in Cantonese): Clerk, please ring the bell to summon Members to the Chamber.

(After the summoning bell had been rung, a number of Members returned to the Chamber)

CHAIRMAN (in Cantonese): Ms Cyd HO, you may speak now.

MS CYD HO (in Cantonese): Chairman, we are now debating on the provisions with no amendments proposed by the Government. These provisions do not cause much controversy at the Committee stage. However, it is worth bringing up two issues, so that the discussion can be put on record in the Hansard to serve as a reminder for the future legislature and the Government of the points to note in drafting legal provisions.

Chairman, the first point is the long title. The present long title is really wordy. There are a total of 187 English words according to my counting. In the course of scrutiny, the Bills Committee had also raised this issue. Why is it so? There was once a case that a Member intended to propose an amendment, but the authorities advised that if the relevant point was not included in the long title and the amendment proposed by Members was outside the scope of the long title, the amendment would not be accepted. Actually, the more detailed and specific the long title is, the greater the possibility of falling outside its scope.

The Legal Adviser did some counting for us. There are a total of 187 words in the English long title, covering 10 subject matters. The first is to regulate the sale of personal data, and the second is to regulate personal data obtained without consent. Actually, these two matters can be merged into one. The next issue is related to the powers or responsibilities of the Privacy Commissioner for Personal Data (the Commissioner). Actually, these can be replaced by the expression "and to provide for related and consequential matters". In this way, the long title can be simplified and arguments among Members be reduced.

The Legal Adviser has been very helpful and has compiled statistics on the average number of words in the long titles of all the bills introduced into Legislative Council from the first term to the fourth term. In the first two years, that is, from 1998 to 2000, the average number of words in the long titles of bills ranged from 35 to 73 English words; in the current fourth term, the average number of words only stood at 37. However, the long titles of bills which are more controversial and complex tend to be very long. I have also got some relevant information. For example, the long title of the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003 contains 300 English words; the long title of the Hong Kong Chief Executive Election and Legislative Council Election (Miscellaneous Amendments) Bill 2006 contains 333 English words; and the long title of the bill on the first civil servant pay cut after the financial turmoil contains 255 English words.

The Government has, on various occasions, narrowed the scope of bills. I do not understand what purpose does it serve for the Government to draft such a detailed long title for the Personal Data (Privacy) (Amendment) Bill 2011. It is impossible for us to guess the intention of the executive authorities. However, if the provisions for the regulation of commercial institutions, the provisions for conferring powers to the Commissioner and the provisions for introducing other procedural changes are all muddled up, the long title of this Bill can really be written in as many as 100 to 200 words.

The Legal Adviser has asked us not to worry as the President, in deciding whether or not to approve our proposed amendments, will not only consider the contents of the long title. Chairman, this is only the view of the Legal Adviser. I do not know whether he has discussed with you. In addition, no matter you approve or not, we cannot challenge your ruling anyway. We can only choose how to face the ruling. The Legal Adviser has explained to us that when the President makes such consideration, the long title is not a deciding factor. The Legislative Council Brief and the legislative intent stated in the Brief are also within the scope of reference. However, when such a step is taken, a demand in greater detail is all the more necessary. At present, we are still uncertain whether the reference to such papers will widen or constrain our right to propose amendments to bills. We think we have to consider on a case-by-case basis.

Therefore, I have to make a speech to put on record the views of the Bills Committee. In this regard, we really have to look into the general guiding

principle of the Department of Justice in law drafting to see why some long titles contain only 20 or so English words and yet some have to take 333 English words to illustrate the scope of the law. I very much hope that the relevant panel of the next-term Legislative Council will continue to follow up this issue.

Chairman, I wish to raise another point concerning law drafting, which is mainly about the English text. The Chinese term for "data" is "資料". However, both the plural and singular forms of "data" spell the same. Only the verb in agreement is changed, such as "were" to "was" and "are" to "is". Take "data are exempt" as an example. Whether it is a plural or singular noun is reflected in the English grammar. It all started with the earlier discussion about the Legislation Publication Bill concerning some principle-related and across-the-board changes in law drafting matters. For example, to do away with the gender, that is, not only the male form but both the male and female forms are used; to change from plural to singular form, and so on. However, regarding this Bill in particular, we are greatly worried whether such a mechanical change will cope with every situation.

The Legal Adviser was again very helpful and had gathered some information for us. The correct usage he found is that the use of singular or plural form gives different meanings. It should not be changed to singular form across the board, particularly in a piece of legislation. The reason is that in some circumstances, two people, two groups or two categories of data are involved. We cannot use a singular noun to handle personal data of the whole. If we mechanically change all the plural form to singular form, problems will arise. Regrettably, we have failed to persuade the Government. According to the Government, the current practice is to use the singular form in all circumstances, and since the existing legislation is to serve modern people, it is appropriate to use this style of writing.

However, according to our Legal Adviser, it is actually more prudent to keep the difference between the plural and singular forms. However, we are very well aware that, firstly, in terms of the number of votes, we certainly do not have enough votes, and our views on the usage of English expressions will not be accepted; secondly, the Legislation Publication Bill was indeed passed earlier, and the relevant legislation provides for the change of all the drafting methods in an across-the-board and mechanical manner. Therefore, under such circumstances, it is only when some cases emerge in future, that is, when

"something goes wrong", that the Department of Justice will review once again whether such a mechanical drafting method, that is, to change all the expressions across the board without giving due consideration to individual cases, will work or not.

Chairman, although Members have not proposed any amendments in this regard, as the issue concerning the principle of law drafting is involved, I have to speak so that my views will be put on record. Thank you, Chairman.

CHAIRMAN (in Cantonese): Does any other Member wish to speak? Mr James TO, this is the second time you speak.

MR JAMES TO (in Cantonese): Chairman, I am going to speak on clause 12. Chairman, we are really baffled by the fact the police will be granted a special exemption under this provision. Chairman, let me put it in layman terms. If I put forward a data access request, that is, if I ask a data user (for example, an organization or a government department) whether it holds any of my data, the organization or government department concerned will have to give me a reply in writing within 40 days, as a colleague has pointed out earlier.

I wish to draw the attention of Chairman and colleagues to the fact that this 40-day period applies to all organizations. In other words, no matter the organization is a one-man business or a large department, it has to inform the requestor in writing. Oddly, the Government has proposed an exception, which we find pretty difficult to understand. Sometimes, members of the public may consult the police if they have criminal records when they are, for example, seeking jobs or applying for emigration. They need to obtain something called the Certificate of No Criminal Conviction from the police, which is not free of charge. However, this time, the police requested an exemption or the Government granted it with an exemption …… While all organizations are required to inform the requestor in writing within 40 days, the police is the only organization in this world to be exempted from this provision. What is more, the scope is narrow as only the access to information on criminal records is covered. I do not understand why all organizations are required to inform in writing, but only the police is allowed to give an oral reply. I think this is very weird.

I wonder if the police's justification is, while oral reply to request pertaining to criminal record can be made within 40 days, written reply cannot be made within the same time limit. We must understand that over the past decade or two, the Finance Committee and other committees have supported the computerization of the police, which include a complete computerization of criminal records. Provisions have also been provided to the police for introducing fingerprint identification or verification. This is because even if the police cannot get anything belonging to the criminals, they can at least use the fingerprints left at the crime scene to verify if they have previously committed any crimes. This is a rather complicated procedure. And yet, provisions have been provided for this cause. The police have pretty superb computers. So long as a fingerprint is obtained, the computer can undergo a verification process and match it with tens of thousands of fingerprints in the database at a very high speed. In the past, fingerprints were verified one by one, which took excessively long time.

However, for such a large department with sufficient manpower and equipment, how can it say that only oral but not written confirmation can be made within 40 days. Obviously, it takes more time to issue written notice than give oral reply. Certainly, the justification given is that by giving an oral reply, people can know in advance or can confirm something. However, Members should bear in mind that if I am applying for emigration, seeking jobs or applying for government posts, I must have a written confirmation. What should I do if only verbal notice is received? Should I call the Criminal Records Bureau, record our conversation and ask the rank of the officer whom I talk to? This is not possible. If the police only make verbal notice, the applicant will not be able to produce any evidence for meaningful use. Should we really record the conversation and send the recording to the relevant departments, kindergartens or security companies? This is not possible.

Therefore, if a business operator or an organization, large or small, has to be penalized for failing to comply with data access requests, I find it too awkward to learn that the police alone claim that a reply cannot be given within 40 days. What is more, as far as I understand, the efficiency of our police is not that low. I am pretty sure that the proposal is definitely put forward by the police as the Government or the Deputy Secretary will not propose such an exemption for no reason. I hope the Government will understand that even if I am the Secretary

for Security, I cannot justify that it is a reasonable request to subject the police to a comparatively lower standard of service than others.

Chairman, I am sorry that due to clashes of meetings, we might have missed the discussions of the relevant provision during the clause-by-clause examination stage. Since I do not agree with that provision, I now take this opportunity to raise the issue for discussion again. Some people may query why I previously did not oppose the provision. Honestly speaking, given that this is a critical period during which many meetings were held at the same time to discuss, for example, the bill on first-hand properties or other bills which we are going to examine later, and the time of these meetings frequently clashed, so Members might have inadvertently missed some of the meetings. We simply missed the meetings.

If I have said anything on this issue before, I would certainly not repeat. And yet, for this provision, Secretary, the abovementioned point has not been discussed during the previous deliberation. I wonder if the Secretary will accede to our request. Chairman, I wonder if, in terms of the procedure, I am permitted to delete clause 12(1A) with the Secretary's consent, and have it removed before we put the amendments to vote?

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

SECRETARY FOR CONSTITUTIONAL AND MAINLAND AFFAIRS (in Cantonese): Chairman, just now a number of Members have expressed their views. First of all, I would like to respond to Mr James TO's views on two provisions. He talked about clause 42 when he spoke for the first time. Clause 42 proposes to add section 73F under the Personal Data (Privacy) Ordinance (PDPO). The newly added section 73F is actually related to section 66 of the PDPO. Section 66 only provides that a person shall claim compensation if his data suffers damage by reason of a contravention by a data user. This is compensation for civil claims and has nothing to do with either criminal investigation or prosecution. Earlier, Mr TO has talked about the criminal investigations handled by the police and the prosecution cases handled

by the Judiciary. They nonetheless are not relevant to clause 42 under discussion. Having said that, if Chairman permits, I also wish to respond to Mr TO's views.

Regarding Mr TO's comment made just now, I have already explained, during the Second Reading, the reasons for not granting the Privacy Commissioner of Personal Data (the Commissioner) with the power of criminal investigation and prosecution. Mr TO argued that some departments also carry out criminal investigations and institute prosecutions. In fact, the exceptional practice only applies to some individual departments, while most departments do not adopt such practice.

Mr TO also quoted from my earlier speech that crimes under the PDPO are technical in nature. Perhaps I have not spoken so clearly. I said that crimes under the PDPO are not technical in nature. Law-enforcement officers are often required to make interpretation of the legal provisions, and in the course of investigation, specialized skills might have to be used to investigate contraventions. Let me cite an example. If activities contravening the PDPO are carried out on a computer, it would be appropriate for the case to be followed up and investigated by the police because they are very experienced and professional, and are certainly capable of investigating different types of crimes. Furthermore, the Technology Crime Division of the police is definitely capable of investigating offences relating to computers. We therefore consider the existing arrangement appropriate.

Mr TO has quoted an example to illustrate that the police should establish a special task force to handle these cases. The police consider that with their experience and professional procedures, they can handle different types of crimes and there is no need to establish a special task force to deal with contraventions of the PDPO. Nonetheless, the police also notice the growing public concern about privacy protection. This is why the Commissioner had attended a meeting with the police and the Constitutional and Mainland Affairs Bureau some time ago to discuss how enforcement and investigation actions could be further improved and enhanced. At present, designated police officers have been deployed to coordinate complaints or investigation cases referred by the Commissioner.

When Mr TO spoke for the second time, he mentioned clause 12, which proposes to amend section 19 of the PDPO. Mr Albert CHAN is also concerned

about clause 18 …… Sorry, he is concerned about the amendment to section 19 of the PDPO. Given that Mr Albert CHAN has also talked about the amendment to section 19 of the PDPO, I would like to make a joint response.

Let me first talk about the points mentioned by Mr Albert CHAN. Under the existing PDPO, if a data subject puts forward a data access request, the data user must comply with the request within 40 days. Mr CHAN worried that 40 days is a pretty long period of time and fabrication of data is therefore possible. I wish to point out that this 40-day requirement has been provided in the PDPO, and it is not a new amendment under the Bill. We must take into account the different sizes of the data users, which can be large or small. While some are pretty mature in terms of information technology, some small and medium-sized organizations may still be using manual method to handle requests due to limited manpower. When specifying the statutory time limit, we must take into consideration the various kinds of data users. As this 40-day requirement has already been provided in the PDPO, we have not proposed any amendment in the present review.

Since Mr TO has also discussed section 19 of the PDPO, I would like to respond to him as well. Regarding section 19 which requires that a written response to be made within 40 days, Mr TO asked why only the police are allowed to make reply orally. It seems that Mr TO have considered or assumed that the police are unable to inform in writing within 40 days. However, this is not the reason. We know clearly that the major reason is — as Mr TO has said — because section 19 is a very specific provision with pretty narrow coverage. If a data subject requests the police for information about whether or not he has criminal record, the police can simply reply orally once it is verified that he does not have any criminal record. No written reply is required.

As Mr TO has said, this provision is proposed by the police. The proposal is made with due consideration of the rehabilitation of ex-prisoners. If the police are required to provide written confirmation to all inquiries for criminal record, the ex-prisoners will certainly not get any proof of no criminal conviction. Noting that this may seriously affect the rehabilitation of ex-prisoners, the police thus put forward this proposal. Since most of the views collected during the public consultation supported this amendment, we have included it into the present amendment Bill. We have briefed the Bills Committee on this amendment.

I also wish to make further response to Mr Albert CHAN's speech. Apart from expressing concern over the 40-day requirement as specified in section 19, Mr Albert CHAN also mentioned clause 18, which is concerned with the amendment to section 31(4) of the PDPO. Section 31(4) is an offence provision, which points out that a data user who, in a matching procedure request, supplies any information which is false or misleading in a material particular for the purpose of obtaining the Commissioner consent to the carrying out of the matching procedure to which the request relates, commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for six months. I want to explain that this provision has already been provided in the existing PDPO. The present amendment is mainly a swap of position and does not involve any new offence or penalty. Since the Commissioner has not received any complaint about the matching procedure so far, we do not consider it necessary to make any changes.

Chairman, I will now respond to the views of Ms Cyd HO. The first point she raised is concerned with the long title of the Bill. The Secretary for Justice and the lawyer responsible for drafting this Bill has thoroughly briefed the Bills Committee why the long title was drafted in the present form. The major reason is that the coverage of the long title should be wide enough to embrace the whole of the contents of the Bill. As for the length of, and the level of details of the long title, they have to be decided by reference to the context of each case.

The long title of the Bill has set out the major subject matters covered by the Bill. This is because the Bill has introduced a wide range of substantive amendments and has an extensive coverage, including direct marketing and the sale of personal data, giving new powers to the Commissioner, as well as providing for new exemptions and amending the Data Protection Principles. Therefore, the Bill has a pretty extensive coverage and does not have a common theme. To give users a clear idea of the contents of the Bill, the Secretary for Justice and officer responsible for drafting the Bill considered it appropriate to set out the major subject matters in the long title. If the long title of the Bill merely writes, "A Bill to amend the Personal Data (Privacy) Ordinance", such general statement cannot help the users understand the contents of the Bill. Therefore, the long title of the Bill is drafted in the present form.

Furthermore, Ms HO mentioned that the term "personal data" under the Ordinance has been changed from the plural form to the uncountable form —

meaning the collective uncountable noun which we learnt at school. She worried about this form of drafting and queried if this change was too mechanical and thus failed to tackle all situations. We have also given a detailed explanation on this amendment to the Bills Committee. The major reason for introducing this amendment is because after careful examination, colleagues of the Judiciary discovered that "data" is the plural form of *datum* in Latin, and is still used as such in English — especially in scientific fields. However, in modern, non-scientific use, it is commonly treated as uncountable noun, similar to words such as information, taking a singular verb. This usage is widely accepted as standard English.

We also noticed that "personal data" is widely reported in the English language media and in corporate and government communications as an uncountable noun with a singular verb agreement. To reflect the increasingly dominant contemporary use of "data" as an uncountable noun, we have changed the related verbs in the Bill to the singular form. Although Ms HO is not present at the meeting, I also hope that she can rest assured that such change is not mechanical at all. We did not search for the word "data" using word processing software and replace the singular verbs with plural ones. Colleagues of the Judiciary has studied the entire Bill — both the Chinese and English versions — from the very beginning. Once the word "data" or "資料" is found, they would decide on the best amendment in consideration of the context. Therefore, we have not merely replaced "data" with "datum", "are" with "is" and "were" with "was", sometimes amendments have to be made to the whole line or sentence so as to comply with the general usage of the term.

Chairman, I so submit.

MR JAMES TO (in Cantonese): Chairman, I consider the above responses made by the Secretary, in particular with regard to clause 12, unacceptable. Sometimes, good intention alone is not enough. Judging from the context of the provision, it means that so long as the Certificate of No Criminal Conviction will be issued, the police can only give oral reply so as to help ex-prisoners secure a job in a certain organization. Then, how about other cases that does not only require an oral reply?

The question is, if the organization concerned insists on getting a Certificate of No Criminal Conviction and there is evidence that such certificates will be issued by the police, then even though the provision provides for a verbal notice, a Certificate of No Criminal Conviction will eventually be issued to a person who does not have any criminal record. In other words, if a person does not get a Certificate of No Criminal Conviction, we can safely presume that he actually has criminal record.

Though the Government intends to provide assistance from an institutional perspective, it does not seem to do much help. Perhaps the entire system of issuing the Certificate of No Criminal Conviction by the police requires a review. Chairman, why am I so frustrated? Because this issue has been discussed for a decade or two. Why does the Government consider it not possible to issue the Certificate of No Criminal Conviction or provide written confirmation for people who have come "clean" under the Rehabilitation of Offenders Ordinance, so as to certify that they do not have any criminal record? The present approach of the Government will only deprive people who have never had any criminal record of a Certificate of No Criminal Conviction, thereby prejudicing their chance of emigration with their family members.

Therefore, even if this is the genuine intention of the Government, the suggested approach may not achieve the intended purpose. Worse still, the new requirement set for the police is lower than that of other departments, business operators or organizations. I still hope that the Government will single out this provision; if not, Chairman, can we request to vote on clause 12 separately?

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

SECRETARY FOR CONSTITUTIONAL AND MAINLAND AFFAIRS (in Cantonese): Chairman, regarding the proposed amendment to section 19, it is actually proposed by the police and supported by the Privacy Commissioner of Personal Data. In the pubic consultation exercise conducted in 2009, the majority views collected also agreed to help the rehabilitation of ex-prisoners by way of legislative amendments. We have thoroughly briefed the Bills

Committee on the need to put forward this proposal, and received its support. Therefore, I hope that Members will support the amendment today.

As for the amendment to section 19, it is actually an overall structural change made to the entire provision of section 19. Therefore, if a certain part is removed, the structure and context of the entire provision may not be able to reflect the policy or legislative intent of the drafting of the Bill.

Thank you, Chairman.

MR JAMES TO (in Cantonese): Chairman, I still wish to take this brief opportunity to ask the Government to explain, apart from the provision under discussion, whether or not the system for applying the Certificate of No Criminal Conviction will be abolished. If not, a business operator or organization may make negative judgment about a person who fails to get a Certificate of No Criminal Conviction. Then, what is the point of discussing this provision? I really do not understand. Are we going to completely abolish the entire system? Will the Certificate of No Criminal Conviction no longer be issued to anyone, but only verbal notice will be given? This is nonetheless impracticable because people who intends to emigrate must obtain the Certificate of No Criminal Conviction for submission to the relevant consulate.

CHAIRMAN (in Cantonese): Secretary for Constitutional and Mainland Affairs, do you have any response?

SECRETARY FOR CONSTITUTIONAL AND MAINLAND AFFAIRS (in Cantonese): Chairman, sorry, I am not in a position to reply on behalf of the Security Bureau or the police, whether the system will be reviewed or abolished.

CHAIRMAN (in Cantonese): Since Mr James TO has requested ……

(Mr Albert CHAN stood up)

CHAIRMAN (in Cantonese): Mr Albert CHAN, what is your point?

MR ALBERT CHAN (in Cantonese): Chairman, I just want to speak.

CHAIRMAN (in Cantonese): Mr CHAN, please speak.

MR ALBERT CHAN (in Cantonese): Okay, Chairman. I have to thank Mr James TO for raising this point. Looking back at the amendment proposed by the Government, section 19(1A)(b) clearly provides that the Hong Kong Police Force "must comply with the request by informing the requestor orally, within 40 days after receiving the request, that it does not hold such record."

Mr James TO has highlighted one point earlier, to put it simply, it is the Police Force does not hold such record. The significance of this point lies precisely on the fact that many people often need to apply for a "Good Citizen Certificate". I am not sure when the provision was proposed in the first place …… I hope that the Secretary can help to elucidate …… Even if we are not capable of amending or refuting the relevant provision, I believe the Government's elucidation of the oral reply will certainly help improve and address the issue.

When the provision was proposed in the first place, I believe it is not intended to target at the "Good Citizen Certificate" — I hope that it is not targeted at the "Good Citizen Certificate" — because I understand that misunderstanding often occurs when people report or lodge complaints to the police. For example, after a person reported a case at the police station, the police might regard it as a complaint and thus did not make formal charging. Yet, the person concerned thought that the police had made formal charging. Subsequently, the person concerned might ……

CHAIRMAN (in Cantonese): Mr CHAN, you need not make such detailed comparison. You have already raised your question, so let the Secretary reply.

MR ALBERT CHAN (in Cantonese): Fine, Chairman, I just want to briefly say a few more words.

I think that the difference here is very important. If the relevant provision does not cover the application of the "Good Citizen Certificate", the problem will be resolved and the police will not have to provide any written confirmation in response to people's requests. I do not fully agree with the provision, but if it is dealt with from a technical point of view …… I hope that the Secretary will make an elucidation later and point out that the provision does not cover the application of the "Good Citizen Certificate". I believe this will address the concerns and worries of many people — especially Mr James TO and me.

CHAIRMAN (in Cantonese): Secretary for Constitutional and Mainland Affairs, do you have any response?

SECRETARY FOR CONSTITUTIONAL AND MAINLAND AFFAIRS (in Cantonese): Chairman, today, I cannot give a concrete and specific reply to the question raised by Mr Albert CHAN, because the "Good Citizen Certificate" is only a general term used by members of the public. What exactly does it mean? The relevant amendment is mainly about whether or not the police hold any criminal record of a person. This is the issue under discussion, and interpretation of the "Good Citizen Certificate" may be different from that of the general public. Also, people may apply for such written response from the police for different purposes. Given the varied purposes or scenarios, I think that it will be difficult for us to arrive at a conclusion today. As for another issue raised by Mr CHAN earlier concerning the report of cases or the giving of statement, it is definitely a separate issue. Thank you, Chairman.

CHAIRMAN (in Cantonese): It is now 12.25 pm. Mr James TO has requested to take out clause 12 from other clauses, which also stand part of the Bill, and put it to vote separately. Since the Secretariat needs some time to adjust the voting system, it is the best time for Members to go for lunch. The meeting will resume at 1.30 pm.

12.26 pm

Meeting suspended.

1.30 pm

Committee then resumed.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Since Mr James TO requested to take out clause 12 from other clauses, which also stand part of the Bill, and put it to vote separately, I therefore now put the question to you and that is: Clauses 2, 5, 6, 10, 14 to 20, 22, 23, 25, 26, 29, 30, 31, 37 and 40 to 43 stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(No hands raised)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the motion passed.

CHAIRMAN (in Cantonese): I now put the question to you again and that is: Clause 12 stands part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(No hands raised)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the motion passed.

CLERK (in Cantonese): Clauses 1, 3, 4, 7, 8, 9, 11, 13, 24, 27, 28, 32 to 36, 38 and 39.

SECRETARY FOR CONSTITUTIONAL AND MAINLAND AFFAIRS (in Cantonese): Chairman, I move that the clauses read out just now be amended as set out in the paper circularized to Members. The major amendments are as follows: Firstly, we proposed to amend clause 1, providing that clauses 20, 21, 37(2), 38 and 42 (which are concerned with empowering the Privacy Commissioner of Personal Data (the Commissioner) to provide legal assistance to a data subject and direct marketing) will come into operation on a day to be appointed by the Secretary for Constitutional and Mainland Affairs by notice published in the Gazette, whereas the remaining provisions will come into operation on 1 October 2012.

We proposed to amend clause 3 to revise the definition of "data user return" in the Personal Data (Privacy) Ordinance (PDPO) and add the definition of "change notice". The above changes are corresponding amendments made in response to the proposed changes to the relevant provisions. Clause 4(2) proposed to amend section 8(1)(g) of the PDPO, which originally sought to enable the Commissioner to provide assistance to its counterparts in jurisdictions outside Hong Kong. After serious consideration, we held that the preamble of section 8(2) of the PDPO and other amendments have empowered the Commissioner to provide assistance to and enlist assistance from his counterparts in jurisdictions outside Hong Kong, we will therefore withdraw clause 4(2).

Clause 8 proposes to add section 14A to the PDPO to empower the Commissioner to require the relevant person to provide, for the purpose of verifying the accuracy of information in a data user return, any document, record,

information or thing, or respond in writing to any question specified in the written notice. Section 14A(3) provides that the relevant person may refuse to provide any document, for example, or any response to any question if he is entitled or obliged under this or any other Ordinance to do so. We notice that there is no statutory provision to empower the person concerned to refuse to provide any document or response. Therefore, the words "this or" in section 14A(3) should be deleted. Furthermore, we proposed to add the word "reasonable" under section 14A as appropriate to require the Commissioner to reasonably exercise his relevant power. We also propose to add sections 14A(5A) and 14A(7) to provide for the offence and penalty provisions.

Clause 24(7) proposes to add new sections 46(7) to 46(9) to the PDPO to enable the Commissioner to, subject to certain conditions, disclose to his counterparts in jurisdictions outside Hong Kong matters ……

(Mr James TO stood up)

CHAIRMAN (in Cantonese): Secretary, please hold on. Mr James TO, what is your point?

MR JAMES TO (in Cantonese): A quorum is not present.

CHAIRMAN (in Cantonese): Clerk, please ring the bell to summon Members to the Chamber.

NEXT MEETING

(The summoning bell had been rung for 15 minutes)

CHAIRMAN (in Cantonese): Council now resumes.

Council then resumed.

PRESIDENT (in Cantonese): As 15 minutes have expired and a quorum is still not present, I now adjourn the Council.

Adjourned accordingly at ten minutes to Two o'clock.