

立法會
Legislative Council

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by the Administration)

Panel on Constitutional Affairs

Minutes of meeting
held on Monday, 16 February 2015, at 2:30 pm
in Conference Room 1 of the Legislative Council Complex

Members present : Hon TAM Yiu-chung, GBS, JP (Chairman)
Hon Albert HO Chun-yan
Hon CHAN Kam-lam, SBS, JP
Hon LEUNG Yiu-chung
Hon Emily LAU Wai-hing, JP
Hon Abraham SHEK Lai-him, GBS, JP
Hon Frederick FUNG Kin-kee, SBS, JP
Hon WONG Kwok-hing, BBS, MH
Prof Hon Joseph LEE Kok-long, SBS, JP, PhD, RN
Hon Jeffrey LAM Kin-fung, GBS, JP
Hon WONG Ting-kwong, SBS, JP
Hon Cyd HO Sau-lan, JP
Hon Starry LEE Wai-king, JP
Dr Hon LAM Tai-fai, SBS, JP
Hon CHAN Kin-por, BBS, JP
Dr Hon Priscilla LEUNG Mei-fun, SBS, JP
Hon IP Kwok-him, GBS, JP
Hon Mrs Regina IP LAU Suk-yeet, GBS, JP
Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung
Hon WONG Yuk-man
Hon Claudia MO
Hon NG Leung-sing, SBS, JP
Hon Steven HO Chun-yin
Hon YIU Si-wing
Hon Gary FAN Kwok-wai
Hon MA Fung-kwok, SBS, JP
Hon Charles Peter MOK, JP
Hon CHAN Chi-chuen
Dr Hon Kenneth CHAN Ka-lok

Hon CHAN Yuen-han, SBS, JP
Hon Alice MAK Mei-kuen, JP
Dr Hon KWOK Ka-ki
Hon Christopher CHEUNG Wah-fung, SBS, JP
Dr Hon Fernando CHEUNG Chiu-hung
Hon SIN Chung-kai, SBS, JP
Dr Hon Helena WONG Pik-wan
Hon IP Kin-yuen
Dr Hon CHIANG Lai-wan, JP
Hon Tony TSE Wai-chuen, BBS

Members absent : Hon Paul TSE Wai-chun, JP (Deputy Chairman)
Hon LEE Cheuk-yan
Hon James TO Kun-sun
Dr Hon LAU Wong-fat, GBM, GBS, JP
Hon Ronny TONG Ka-wah, SC
Hon CHEUNG Kwok-che
Hon WONG Kwok-kin, SBS
Hon Michael TIEN Puk-sun, BBS, JP
Hon James TIEN Pei-chun, GBS, JP
Hon WU Chi-wai, MH
Hon Dennis KWOK
Hon Martin LIAO Cheung-kong, SBS, JP
Hon CHUNG Kwok-pan

Public Officers attending : Items II and III

Mr LAU Kong-wah
Under Secretary for Constitutional and Mainland Affairs

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

Miss Helen CHUNG Chi-ching
Principal Assistant Secretary for Constitutional and
Mainland Affairs

Item IV

Mr Allan CHIANG
Privacy Commissioner for Personal Data

Ms Brenda KWOK
Chief Legal Counsel
Office of the Privacy Commissioner for Personal Data

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

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

Staff in attendance : Mr Kelvin LEE
Assistant Legal Adviser 1

Miss Cindy HO
Senior Council Secretary (2) 3

Mrs Fanny TSANG
Legislative Assistant (2) 3

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I. Information papers issued since the last meeting
[LC Paper No. CB(2)764/14-15]

1. The Panel noted that the "Constituency boundary maps in respect of the 2015 District Council ("DC") Election" [LC Paper No. CB(2)764/14-15] had been issued to members after the last meeting.

II. Items for discussion at the next meeting
[LC Paper Nos. CB(2)823/14-15(01) and (02)]

2. Members agreed to discuss the following items proposed by the Administration at the next meeting on 16 March 2015 at 2:30 pm -

- (a) legislative amendments regarding the 2016 Legislative Council ("LegCo") Election; and
- (b) progress of Discrimination Law Review by the Equal Opportunities Commission.

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III. Review on the subsidy rate of the financial assistance for candidates and the election expenses limit for the 2015 DC Election

[LC Paper Nos. CB(2)823/14-15(03) and (04)]

3. The Under Secretary for Constitutional and Mainland Affairs ("USCMA") briefed members on the salient points of the Administration's paper [LC Paper No. CB(2)823/14-15(03)]. Members noted the updated background brief prepared by the LegCo Secretariat [LC Paper No. CB(2)823/14-15(04)].

Discussion

4. Mr SIN Chung-kai pointed out that the proposed adjustments to the subsidy rate of the financial assistance for DC candidates and to the election expenses limit ("EEL") for DC elections were merely adjustments on the basis of inflation. He considered that there were no substantive increases in the subsidy rate and EEL under the current proposals. He also queried the rationale of the arrangement set out in paragraph 3(a) of the Administration's paper, as it seemed that the subsidy amount payable to candidates from uncontested constituencies derived under the arrangement would be generally higher than that payable to those from contested constituencies. Taking a voter turnout rate of 50% in a typical DC election as an example, Mr SIN said that if a candidate standing in a contested election obtained as high as 60% of valid votes in the constituency concerned, under the current scheme, he/she would still only receive financial assistance amounting to 30% of the number of registered electors for that constituency multiplied by the subsidy rate. On the other hand, a candidate returned through an uncontested election would receive financial assistance amounting to 50% of the number of registered electors for that constituency multiplied by the subsidy rate, while he/she probably did not need to carry out many electioneering activities since the election was uncontested.

5. USCMA advised that under the current proposals, both the subsidy rate of the financial assistance for DC candidates and EEL for DC elections were to be increased concurrently to take account of the estimated cumulative inflation rate from 2012 to 2015. As regards Mr SIN's concern about the arrangement set out in paragraph 3(a) of the Administration's paper, USCMA said that the situation envisaged might not arise, as a candidate

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eligible for financial assistance would only receive an amount which had to be the lowest of those calculated in accordance with the arrangements in paragraph 3(a) to (c) of the Administration's paper.

6. Ms Emily LAU considered that the Administration should not let a candidate receive only the lowest of the three amounts under the arrangements in paragraph 3(a) to (c) of the Administration's paper. She urged the Administration to revise the scheme and let the candidate receive the highest, instead of the lowest, of the three amounts calculated under the said paragraph. She said that the Administration should make reference to overseas experience and grant subsidy in accordance with the total number of valid votes received by the candidate. In this way, the candidate who performed well and managed to get more valid votes would receive more subsidies. She considered that this would better support election candidates and also the development of political parties in Hong Kong. She added that her proposed revised arrangement was not expected to entail substantial additional financial implications.

7. The Deputy Secretary for Constitutional and Mainland Affairs ("DSCMA") pointed out that financial assistance for election candidates was first introduced in the 2004 LegCo election, with the aim of encouraging more candidates to participate in LegCo elections and cultivating an environment to facilitate the development of political talent in Hong Kong. Balanced consideration of other factors, including the need for prudent use of public funds, had to be made in determining the amount of financial assistance payable to candidates. DSCMA said that the financial assistance scheme was introduced in 2004 alongside with the reduction of two rounds of free mailing service to one, so as to allow the candidates greater flexibility in their publicity activities. He added that in 2007, the financial assistance scheme was extended to DC elections.

8. Ms Emily LAU said that the reduction of two rounds of free mailing service to one had already enabled the Government to achieve savings. She remained of the view that the Government should enhance the provision of financial assistance for candidates and strengthen support for the development of political parties in Hong Kong. Mr IP Kwok-him also considered that there was room to relax the existing arrangements set out in paragraph 3 of the Administration's paper. The Chairman requested the Administration to consider members' suggestions, and enquired about the amount of additional financial implications that would be incurred if candidates were to receive the highest of the three amounts under the

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arrangement in paragraph 3(a) to (c) of the Administration's paper. DSCMA explained that it would be quite difficult to estimate such financial implications, as the financial assistance payable under such proposal in future elections would depend on a number of factors, such as the number of candidates eligible for financial assistance, votes obtained by each candidate, etc. Nonetheless, USCMA agreed to give thought to members' views and suggestions.

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9. In response to Mr IP Kwok-him's enquiry, USCMA said that the Administration intended to maintain that each candidate in DC elections would be entitled to one round of free mailing for communication with his electorate.

10. Ms Claudia MO considered that the suggestion of allowing a candidate to receive the highest of the three amounts calculated under the arrangement in paragraph 3(a) to (c) of the Administration's paper might need to be further examined. She pointed out that under this proposal, if the election was uncontested, the candidate concerned would only bear very little election expenses but he/she would surely receive a large amount of financial assistance which would be equivalent to 50% of the number of registered electors for the constituency concerned multiplied by the subsidy rate. Separately, Ms MO said that some prospective candidates would submit their nomination forms at a rather late stage, so that the expenses incurred in their conduct of activities that could potentially help with their electioneering efforts before they had made public their candidacy in the concerned election would not be counted as election expenses. She asked whether any action could be taken to deal with the problem. In response, USCMA explained that under the existing law, once a person had publicly declared his or her intention to stand for election, regardless of whether he/she had submitted his or her nomination form, his or her spending of election expenses would start to be counted.

IV. Briefing by the Privacy Commissioner for Personal Data
[LC Paper Nos. CB(2)823/14-15(05) and (06)]

11. At the invitation of the Chairman, the Privacy Commissioner for Personal Data ("the Commissioner") gave a PowerPoint presentation on an update of the work of his Office ("PCPD") in 2014.

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PCPD's work

12. Miss Alice MAK said that she had recently referred 19 cases of telemarketing calls and related frauds involving the use of personal data without the consent of the data subjects to PCPD for follow-up. She expressed appreciation of PCPD which had commenced investigation expeditiously. Miss MAK further enquired about the measures to be taken to step up the protection of personal data contained in public registers maintained by the Government. The Commissioner said that survey on the protection of personal data contained in public registers maintained by the Government was a special focus of PCPD's work in 2015. PCPD would examine the work carried out in this regard by government departments and publish a survey report with recommendations.

13. Miss Alice MAK expressed concern about the need to step up the regulation of person-to-person telemarketing calls ("P2P calls"). The Commissioner said that PCPD was also very concerned about the nuisance caused by P2P calls as revealed in the survey commissioned by PCPD in 2014. PCPD had appealed to the Secretary for Commerce and Economic Development ("SCED") for the expansion of the Do-not-call registers administered by the Office of the Communications Authority to include P2P calls. According to the record of the Panel on Information Technology and Broadcasting, SCED would commission a survey in the first half of 2015 to assess the issues involved and report back to that Panel in the second half of 2015. Further, PCPD had been working with the Department of Justice ("DoJ") and the Police to address the difficulties in criminal investigation and prosecution of suspected offences referred by PCPD, for example, identifying the organization in Hong Kong responsible for the calls when they were made outside Hong Kong. DSCMA supplemented that according to a paper submitted by the Commerce and Economic Development Bureau ("CEDB") to the Panel on Information Technology and Broadcasting, CEDB was about to commission a Consultant to conduct a survey with a view to soliciting the views of the public, the business sector and the industry on the regulation of P2P calls, as well as the employment and business situations of the industry. It was expected that the survey would be completed in the first half of 2015.

14. Mr CHAN Chi-chuen expressed concern about the large increase in the number of complaints concerning cyber-bullying from six in 2013 to 34 in 2014. He enquired about the activities that might constitute cyber-bullying and the actions to tackle cyber-bullying. The Commissioner

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said that the increase was principally attributable to the increasing popularity of social networking and the prevalent use of the Internet. PCPD had published an information leaflet called "What you need to know about cyber-bullying" in 2014 to raise public awareness of the precautionary measures to protect privacy on social network platforms and the remedies that victims of cyber-bullying might consider. He explained that cyber-bullying acts were wide-ranging and covered, apart from personal data privacy, criminal intimidation, infringement of intellectual property and defamation. For criminal acts, they should be followed up by the Police. Where cyber-bullying involved the collection and use of personal data, the Data Protection Principles ("DPPs") in the Personal Data (Privacy) Ordinance ("PDPO") which stipulated, inter alia, that personal data should only be used for the purpose for which it was originally collected or a directly related purpose, had to be observed. He added that an organization using the personal data obtained from the public domain (e.g., public registers) would still be subject to such limitation. Where there was contravention of the DPP, PCPD could serve an enforcement notice on the data user to remedy the contravention.

15. Dr KWOK Ka-ki enquired about the progress of investigation of complaints about cyber-profiling of persons involved in the Occupy Movement. The Commissioner advised that except for one case which was still under investigation, the cases had been concluded without commencing formal investigation principally because the complaints were not lodged by the data subjects. The Commissioner said that for the case still under investigation, PCPD was tracing the party at source who had disclosed the relevant data online and the assistance of the telecommunications company concerned had to be sought.

16. Ms Cyd HO sought the Commissioner's views on the scope for enhancing his role and functions under PDPO in order to strengthen privacy protection in Hong Kong. The Commissioner said that his role and functions were defined in PDPO which sought to deal with specifically privacy of individuals in relation to personal data. Hence, he was unable to follow up cases involving invasion of privacy not relating to personal data, e.g., private surveillance, media intrusion and stalking behaviour. He also saw new challenges arising from the pervasive use of information and communications technologies ("ICT") nowadays, which the DPPs under PDPO might not adequately handle and a new principle to impose accountability on organizations might be worth considering. Ms HO urged the Administration to undertake a review of PDPO in conjunction with

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PCPD with a view to tackling the above inadequacies, and to come up with legislative proposals.

17. Mr WONG Yuk-man expressed concern about the large number of complaints (1 702) received by PCPD in 2014, 41% of which concerned the use of personal data without the consent of data subjects (694 cases). He suggested that PCPD should review the effectiveness of its promotion and public education efforts. Noting that 288 of the 1 702 cases were related to the financial sector, Mr WONG considered that there was little improvement in the tackling of unsolicited direct marketing calls which in his view mainly involved offer of personal loans. He expressed concern that of the 20 cases of suspected offences referred to the Police for criminal investigation and consideration of prosecution in 2014, no conviction was recorded.

18. The Commissioner responded that Mr WONG's comments on PCPD's performance had to be viewed in context. He explained that telemarketing calls involving unauthorized use of personal data had to be tackled through the concerted efforts by various bureaux and departments, not by PCPD alone. The Commissioner reiterated that PCPD had been proactive in seeking collaboration with other organizations such as DoJ and the Police. For example, he had plans to reach out to the Police districts to fill in any knowledge gaps relating to the offences under PDPO. The Commissioner further pointed out that a complainant who felt aggrieved by PCPD's enforcement decision could lodge an appeal to the Administrative Appeal Board, and so far the decisions of PCPD had been upheld in 90% of such appeal cases.

19. Dr Fernando CHEUNG expressed concern about the "right to be forgotten" as ruled by the European Union ("EU") court in May 2014 which affirmed an individual's right to compel a search engine to de-list search results which linked the person's name to certain online publications. He asked whether similar measures would be adopted in Hong Kong and the Asia-Pacific region.

20. The Commissioner explained that the "right to be forgotten" was part of the data protection reform proposals of EU. The EU court's decision recognized that the right was not absolute and could only be exercised in specific circumstances based on the merits of each case. As the court's decision was not binding on Hong Kong's court and the concept was fluid and rapidly evolving, he preferred to adopt a wait-and-see position in the interim, pending further developments in the application of the concept in EU and future relevant court decisions outside EU.

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Removal of statutory time limit to serve notice to refuse investigation

21. Dr CHIANG Lai-wan expressed concern about the PCPD's proposal of removal of statutory time limit to serve notice to refuse investigation, and enquired whether the time limit could, instead, be extended from the present 45 days to 65 days or a longer period as deemed appropriate. She considered that the proposed removal might render the complainant to wait for an indefinitely long time for the Commissioner's notification in the future.

22. The Commissioner explained the rationale of the proposal as detailed in paragraphs 37 to 41 of the PCPD's paper under discussion. The Commissioner said that PCPD had refrained from mechanical adherence to the 45-day time frame as flexibility worked best for the mutual benefit of the complainant and the party complained against and an arbitrary decision to refuse to carry out investigation would be subject to appeal. Instead, it had been striving to enhance operational efficiency and attained a high percentage of compliance of the 45-day requirement, albeit short of 100%. Against a performance pledge of 75% compliance which took effect from 1 July 2014, PCPD achieved 77% compliance for the full year 2014. The pledge for 2015 had been raised to 80% compliance. Dr CHIANG Lai-wan considered that the figures showed that the relevant statutory time limit could be met in some cases. She remained of the view that there should not be removal of a statutory time limit which, however, could be extended to, say, 65 days instead. Furthermore, the Commissioner should be authorized to approve any extension beyond the statutory time limit on a case-by-case basis. The Commissioner commented that any statutory time limit would expose PCPD to legal or administrative challenge for non-compliance. He said that the reason for imposing the statutory time limit was not known and no such requirements were imposed on other statutory bodies, such as Equal Opportunities Commission, the Office of The Ombudsman and his overseas counterparts. He added that even if the time limit was raised to 120 days, from his past experience, 100% compliance could not be reached. For example, many complaints on excessive fee imposed for complying with a data access request were best resolved not by PCPD's determination on the exact amount of fee to be settled but by mediation which took time that could not be pre-determined.

Implementation of section 33 of PDPO

23. Mr CHAN Chi-chuen and Ms Emily LAU enquired about the progress in bringing section 33 of PDPO into operation to regulate the transfer of data

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outside Hong Kong. Mr Charles Peter MOK said that the information technology ("IT") sector also considered that section 33 should be implemented as early as possible and called on the Administration to provide a timetable. Mr LEUNG Kwok-hung stressed the need for expeditious implementation of section 33 to guard against the transfer of data to places outside Hong Kong.

24. The Commissioner said that at present, the transfer of personal data to places outside Hong Kong was regulated in some respects under the relevant DPPs of PDPO. However, a breach of DPPs was not an offence, unless the data user refused to comply with the relevant enforcement notice issued to him/her for taking remedial and preventative actions. The Commissioner agreed that section 33, which provided a very stringent and comprehensive regulation of the transfer of data outside Hong Kong, should be implemented as early as possible. PCPD stood ready to assist the Administration to prepare for the implementation of section 33. In this connection, PCPD had compiled a white list of places of high privacy standards to which data transfer could be made legitimately, and a guidance for the organizations to follow in the event section 33 was put into effect. In response to Ms Emily LAU's enquiry on the penalties for breaches in this area before section 33 was implemented, the Commissioner said that a data user who failed to comply with an enforcement notice committed a criminal offence and was liable on conviction to a maximum fine of \$50,000 and imprisonment for two years.

25. DSCMA advised that the Administration had been in close liaison with PCPD on the work pertaining to the implementation of section 33, and would consider engaging a consultant to conduct a business impact study to look at the possible impact on the relevant sectors and ensure their readiness for the implementation of section 33.

26. Ms Emily LAU further asked whether organizations which were suspected to have transferred personal data to places outside Hong Kong in breach of DPPs were required by law to assist PCPD in its investigation. The Commissioner replied in the affirmative. In reply to Ms LAU's further enquiry, the Commissioner said that no complaint in this area had been received so far.

Open recruitment for the post of the Commissioner

27. Miss Alice MAK expressed grave concern as to why the Government did not renew contract with the incumbent Commissioner but conducted

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open recruitment for the post. DSCMA said that as the incumbent Commissioner's term of appointment would expire in August 2015, in line with the established procedures, the Government conducted open recruitment for the post. He advised that the post had been filled by open recruitment which would be conducted in an open, fair and impartial manner.

28. Dr KWOK Ka-ki considered it inappropriate for SCED to serve as the recruitment board member, as SCED had earlier expressed concern about a report published by PCPD concerning the regulation of P2P calls. Ms Cyd HO and Mr Charles Peter MOK shared Dr KWOK's concern. Ms HO said that it was very inappropriate for SCED, being a politically appointed official, to handle the recruitment of the head of a statutory body responsible for monitoring the Government. She considered that SCED should be replaced by someone from the IT sector. Ms Emily LAU considered that the Administration should address concern about the conflict of role as pointed out by Ms HO.

29. DSCMA explained that SCED had been invited to serve as a board member because the recruitment board had to consider whether the candidates possessed the requisite knowledge and experience in relevant areas, some of which were pertinent to SCED.

30. In response to Dr Fernando CHEUNG's views, DSCMA explained that as PCPD was not a national human rights institution, the Paris Principles did not apply to the recruitment exercise under discussion. Ms Emily LAU said that in the Hong Kong Special Administrative Region's reports submitted to the United Nations committees, PCPD was mentioned as part of the existing institutional framework to help promote and safeguard human rights under the relevant ordinances. DSCMA said that the Paris Principles were only applicable to a national human rights institution, which was understood to be one tasked to monitor a wide range of human rights issues, whereas PCPD was not such an institution.

Financial provisions for PCPD

31. Mr Charles Peter MOK expressed appreciation of the Commissioner's useful input to the Bills Committee concerned in the deliberations of the Electronic Health Record Sharing System Bill and his contributions to personal data protection in Hong Kong. He sought the Commissioner's views on whether there had been improvements with the financial provisions

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for PCPD. The Commissioner said that while he was grateful to the Government for the provision of additional resources in the past few years, the provisions still fell short of PCPD's needs to cope with increasing workload. He pointed out that there were over 80 staff members, but only 69 posts were provided with recurrent funding by the Government. PCPD managed to cope with the situation only because many of its staff members had a low level of seniority, but difficulties would arise in meeting the additional staff costs arising from salary increments when the staff members matured and gained experience. The Commissioner said that PCPD also had to face the rental pressure when the tenancy expired in January 2016, which had increased from \$11/ft² in the past decade to \$33/ft² now. He added that there had been no corresponding increase in subvention to offset this threefold rental increase.

32. Mr LEUNG Kwok-hung also expressed appreciation of the Commissioner's work in enhancing protection of personal data and supported provision of additional resources for PCPD to strengthen its work. In response to Mr LEUNG's enquiry, the Commissioner said that while he saw more and more challenges to privacy and data protection arising from increasing popularity of new ICT in today's digital society, PCPD, given the resource constraints, could not do much in policy and research but had to focus on complaint investigations and enquiries. Mr LEUNG said that he would request the Administration to address the problem by increasing allocation of resources to PCPD.

33. In concluding the discussion, the Chairman said he noted that members generally had expressed appreciation of the Commissioner's work. He hoped that PCPD would strive for even better performance.

V. Any other business

34. There being no other business, the meeting ended at 4:45 pm.