

LEGISLATIVE COUNCIL

Panel on Constitutional Affairs

**Special meeting on Friday, 11 September 2009, at 3:00 pm
in the Chamber of the Legislative Council Building**

**Agenda Item I - Consultation Document on Review of the Personal Data
(Privacy) Ordinance**

Background

In June 2006, the Privacy Commissioner for Personal Data (PCPD) formed an internal working group to conduct a comprehensive review of the Personal Data (Privacy) Ordinance (“the Ordinance”).

2. The review was carried out against the following backgrounds:-
 - (a) The rapid technological and e-commerce development since the Ordinance came into effect on 20 December 1996 have given rise to global privacy concern;
 - (b) At international level, there are calls for higher level of personal data privacy protection and stronger sanction and legislation to properly address the privacy impact brought about by technological advancements. Australia, Canada, New Zealand and the United Kingdom all embark actively on the review of their privacy laws; and
 - (c) Personal data privacy has been an evolving concept responding to changes and development in society. The PCPD's regulatory experience shows that there are areas in the Ordinance which need to be reformed.

3. In December 2007, the PCPD presented to the Secretary for Constitutional and Mainland Affairs (SCMA) a number of amendment proposals and issues of privacy concern. Since then, over 50 amendment proposals have been delivered to the SCMA.

PCPD’s Main Proposals

4. The main objectives of PCPD’s proposals are:-

- (a) to respond to issues of public concern and to address comments made by members of the Legislative Council on the inadequacy of protection under the Ordinance;
- (b) to strengthen the enforcement power of the Privacy Commissioner so as to step up protection for personal data privacy right; and
- (c) to address impact on personal data privacy caused by technological advancement.

5. Below is a table showing the corresponding PCPD’s proposals made to address the above objectives.

Objectives	PCPD’s Proposals/ Issues of Privacy Concern for Public Consultation
<p>(a) To address issues of public concern:-</p> <p>(i) Leakage/loss of personal data</p>	<ul style="list-style-type: none"> ➤ Explicit duty on data users to prevent loss of personal data ➤ Personal data security breach notification ➤ New offence of unauthorised obtaining, disclosure and sale of personal data

<p>(ii) Disclosure of personal data caused by outsourcing agents</p>	<ul style="list-style-type: none"> ➤ Specific obligation on data users when engaging processing agents ➤ Regulation of data processors and sub-contracting activities
<p>(iii) Personal data privacy issues arising from the Yahoo's case¹</p>	<ul style="list-style-type: none"> ➤ Whether to deem Internet Protocol Address as personal data ➤ Territorial scope of the Ordinance ➤ Definition of "crime" under section 58 of the Ordinance
<p>(iv) Handling of personal data in time of crisis</p>	<ul style="list-style-type: none"> ➤ New exemption for handling personal data in emergency situations ➤ New exemption on public interest determination
<p>(v) Direct Marketing Activities</p>	<ul style="list-style-type: none"> ➤ Raising penalty for misuse of personal data in direct marketing ➤ Revamping regulatory regime of direct marketing
<p>(vi) To assist the aggrieved data subjects to obtain compensation</p>	<ul style="list-style-type: none"> ➤ Legal assistance to aggrieved data subjects to seek compensation ➤ Power to award compensation to aggrieved data subjects
<p>(b) To strengthen the enforcement power of the Commissioner</p>	<ul style="list-style-type: none"> ➤ Granting criminal investigation and prosecution power to the PCPD ➤ Imposing monetary penalty on serious contravention of data protection principles ➤ Creating a new offence of repeated

¹ See PCPD's investigation report at http://www.pcpd.org.hk/english/publications/files/Yahoo_e.pdf and the decision of the Administrative Appeals Board at http://www.pcpd.org.hk/english/publications/files/Appeal_Yahoo.pdf.

	<p>contravention of a data protection principle on same facts</p> <ul style="list-style-type: none"> ➤ Raising the penalty level of repeated non-compliance with enforcement notice ➤ Providing wider discretion for the Commissioner to issue enforcement notice
<p>(c) To address impact on personal data privacy caused by technological advancement</p>	<ul style="list-style-type: none"> ➤ Imposing new restrictions on collecting, holding, processing or use of sensitive personal data ➤ Creating a new offence of unauthorized obtaining, disclosure and sale of personal data

6. To enable the public to have a holistic view of the Ordinance Review Exercise undertaken by the PCPD since 2006, the PCPD has prepared a paper entitled “*PCPD’s Information Paper on Review of the Personal Data (Privacy) Ordinance*”² which provides additional information for the public to consider before making their submissions to the consultation. The paper contains proposals made by the PCPD to the SCMA as well as relevant issues of privacy concern. A copy of the paper is enclosed [**Separately issued as LC Paper No. CB(2) 2473/08-09 (02)**].

Major areas of difference in views between the Administration and the PCPD

7. Many of the proposals made by the Privacy Commissioner are supported by the Administration. There are some proposals that the Administration and the Privacy Commissioner have difference views. The major areas of difference are briefly set out in the table below.

² Available at http://www.pcpd.org.hk/english/review_ordinance/reviewordinance.html

Proposal No. in the Consultation Paper	Administration's views in the Consultation Paper	PCPD's view
<p>Proposal No. 4 (Granting Criminal Investigation and Prosecution Power to the PCPD)</p>	<p>Not Supported</p> <p>~ Strong justifications are required for the prerogative of initiating criminal prosecution to be delegated.</p> <p>~ Some of the new offences proposed are not technical in nature, and may involve a fine and imprisonment. There could be community concern if the power to prosecute these offences were delegated to the PCPD.</p>	<ul style="list-style-type: none"> • More effective as the Privacy Commissioner who possesses the expertise and first hand information can act expeditiously to deal with the suspected offence. • Granting independent prosecution power to the PCPD will avoid criticism of favouritism where the Police or other government departments are involved in the case as data user.
<p>Proposal Not Pursued (C.1) (Power to Search and Seize Evidence)</p>	<p>Not Supported</p> <p>~ No strong case to grant PCPD criminal investigation and direct prosecution power, hence no need to provide these additional powers to the Privacy Commissioner.</p> <p>~ The existing investigative power of the PCPD is adequate</p>	<ul style="list-style-type: none"> • Essential to PCPD's investigative role in overseeing compliance with the requirements of the Ordinance.

<p>Proposal Not Pursued (C.2) (Power to Call upon Public Officers for Assistance)</p>	<p>Not Supported</p> <p>~ Public officers have all along been providing assistance to the PCPD.</p> <p>~ It is an offence under section 64(9) of the Ordinance for a person who, without lawful excuse, obstructs, hinders or resists the Privacy Commissioner or any other person in the performance of his functions or the exercise of his powers under Part VII (inspection, complaints and investigations).</p>	<ul style="list-style-type: none"> • Essential to the independent regulatory role of the Privacy Commissioner. • It is hard to see how public officers refusing to give assistance to the PCPD will commit the offence under section 64(9).
<p>Proposal No. 6 (Award Compensation to Aggrieved Data Subjects)</p>	<p>Not Supported</p> <p>~ The Law Reform Commission (LRC) opined that conferring power on a data protection authority to award compensation would vest in a single authority an undesirable combination of enforcement and punitive functions.</p> <p>~ It is not appropriate to adopt the Australian model (in the Australia <i>Privacy Act</i>) which advocates settlement by conciliation. The power is part and parcel of the investigation power of the Australian Privacy Commissioner.</p> <p>~ Already put forth Proposal</p>	<ul style="list-style-type: none"> • LRC's recommendation was premised on the assumption that the Court would determine the appropriate amount of compensation upon the Commissioner's certificate of contravention. There is no such arrangement under the current provisions. • Under the Australian model, if conciliation fails to resolve a complaint, the Australian Privacy Commissioner may make a determination. In the determination, the Australian Privacy Commissioner may (a)

	<p>No. 5 to assist aggrieved data subjects in seeking redress through civil remedy.</p>	<p>make a declaration directing the respondent to take steps remedying the contravention; and (b) award damages to the complainant. The PCPD may carry out similar settlement by conciliation. Indeed, many of the complaint cases handled by PCPD are resolved through mediation.</p> <ul style="list-style-type: none"> • Section 66 is rarely invoked in court proceedings, possibly due to lengthy and costly litigation process, and the risk of having to pay the defendant's costs. • Provide aggrieved data subjects a better choice of seeking remedy in a quicker and more effective way. • Have a deterrent effect on data users against breach of the Ordinance.
<p>Proposal No. 9 (Repeated Contravention of a Data Protection Principle on Same Facts)</p>	<p>Not Supported</p> <p>~ This would be moving away from the original intent of adopting the Data Protection Principles in the Ordinance.</p> <p>~ Since the enactment of the Ordinance, the PCPD has not come across such case.</p>	<ul style="list-style-type: none"> • Step up sanctions under the Ordinance against repeated offenders. • It is not uncommon for different complainants complain against the same data user at different times on the same or similar facts.

<p>Proposal No. 10 (Imposing Monetary Penalty on Serious Contravention of Data Protection Principles)</p>	<p>Not Supported</p> <p>~ Whether an act constitutes a serious contravention of a Data Protection Principle is a matter of subjective judgment</p> <p>~ More appropriate to single out particular acts which are of serious nature and make them offences.</p>	<ul style="list-style-type: none"> • Breach of a Data Protection Principle by itself is not an offence. The proposal will provide a deterrence effect to serious contravention of the Data Protection Principles. • The UK Information Commissioner has recently been granted similar power under the Data Protection Act after a full consultation and detailed deliberations.
<p>Proposal No. 11 (Repeated Non-compliance with Enforcement Notice)</p>	<p>Not Supported</p> <p>~ There has not been a serious problem with repeated offenders.</p>	<ul style="list-style-type: none"> • At present, the enforcement power of the Ordinance is comparatively weak in that the power to issue enforcement notice is very much restricted. This may account for the reason why the PCPD has not come across repeated contraventions. • It is not uncommon for legislation to impose heavier penalty on repeated offenders.

<p>Proposal Pursued (A.1) (Revamping Regulatory Regime of Direct Marketing)</p>	<p>Not Supported ~ The Administration is monitoring the situation of using person-to-person calls and will consider the possibility of regulating such activities under the Unsolicited Electronic Messages Ordinance.</p>	<ul style="list-style-type: none"> • It is timely to review the regulatory regime of direct marketing by considering:- <ul style="list-style-type: none"> (i) whether to introduce an “opt-in” regime in place of the current “opt-out” regime; (ii) whether a territorial wide central Do-not-call register be established; and (iii) whether a data user shall disclose the source of the data upon the data subject’s request.
<p>Proposal Pursued (A.3) (Territorial Scope of the Ordinance)</p>	<p>Not Supported ~ The LRC considered it important that data protection law in Hong Kong should apply to a data user within the jurisdiction, even where the data have been transferred to or are being processed in another jurisdiction. ~ It may cause a loophole in the regime in that a company in Hong Kong can arrange the offshore collection of personal data by an agent and outsource the holding, processing and use of such data outside Hong Kong.</p>	<ul style="list-style-type: none"> • The proposal refers to personal data where the whole cycle of “collection, holding, processing and use” is not in Hong Kong. For practical and other reasons, the mere presence in Hong Kong, without more, of a person who is able to control his business operations overseas should not render him a data user subject to Hong Kong law. It would be unfair to the person if the Hong Kong law and overseas law both govern the handling of the data not originated from Hong Kong, particularly

		<p>where there is a conflict of laws situation.</p> <ul style="list-style-type: none"> • The LRC report was prepared 15 years ago in 1994. Personal data privacy protection is an evolving concept in human rights and electronic trade and commerce and should be reviewed in light of the development in Hong Kong and overseas.
<p>Proposal Pursued (B.1) (Public Interest Determination)</p>	<p>Not Supported. ~ Such mechanism will undermine the certainty of personal data privacy protection.</p>	<ul style="list-style-type: none"> • Some overseas data privacy legislations provide for an exemption on the ground of public interest. • The proposal will provide direct solution to enable a data user to release the relevant data in the public interest without contravening Data Protection Principle 3 (change of use of personal data) where circumstances require a timely disclosure.

<p>Proposal Not Pursued (B.2) (Public Domain Exemption)</p>	<p>Not Supported</p> <p>~ It would provide data users with the opportunity to subvert the law by publishing the data. It could result in abuse in the use of information available in the public domain.</p>	<p>Open-minded</p> <ul style="list-style-type: none"> • It is timely to consult the public on whether the same level of protection should be afforded to the personal data in the public domain in light of the rapid technological development during the past decade.
<p>Proposal Not Pursued (C.3) (Power to Conduct Hearing in Public)</p>	<p>Not Supported</p> <p>~ The LRC had recommended that the prospect of a public hearing could act as a real disincentive to the lodging of complaint.</p> <p>~ Besides, the Privacy Commissioner is already empowered to publish a report on the result of investigation under section 48(2) of the Ordinance.</p>	<ul style="list-style-type: none"> • The LRC's concern has been duly addressed by making it a proviso in the proposed amendment that the Privacy Commissioner is required to consider all the circumstances of the case including the request from the complainant for the hearing to be conducted in private. • The publication of a report under section 48(2) is only one aspect of addressing the public's right to know. The proposed amendment will give more flexibility in the matter.

Call for Public Response to the Consultation

8. The Privacy Commissioner calls for public response to the consultation. It is an opportunity for the public to express their views on the scope of coverage of the law, the level of protection they would like to have and whether more severe sanctions should be imposed for breach of the law.

Personal data privacy has become a fundamental right in our society, but there is a need to balance that right with other rights and social interests in maintaining a harmonious society. The Privacy Commissioner is confident that a comprehensive review of the Ordinance with participation by the general public will bring about an updated piece of personal data privacy legislation that amply protects and enforces personal data privacy rights in Hong Kong.

Office of the Privacy Commissioner for Personal Data
9 September 2009