

立法會
Legislative Council

LC Paper No. CB(2)2777/11-12
(These minutes have been seen
by the Administration)

Ref : CB2/BC/8/10

Bills Committee on Personal Data (Privacy)(Amendment) Bill 2011

Minutes of sixth meeting
held on Monday, 9 January 2012, at 2:30 pm
in Conference Room 2A of the Legislative Council Complex

Members present : Dr Hon Philip WONG Yu-hong, GBS (Chairman)
Hon James TO Kun-sun
Hon Emily LAU Wai-hing, JP
Hon TAM Yiu-chung, GBS, JP
Hon Vincent FANG Kang, SBS, JP
Hon WONG Kwok-hing, MH
Hon WONG Ting-kwong, BBS, JP
Hon Ronny TONG Ka-wah, SC
Hon Cyd HO Sau-lan
Hon CHAN Kin-por, JP
Dr Hon Priscilla LEUNG Mei-fun, JP
Hon IP Kwok-him, GBS, JP
Dr Hon Samson TAM Wai-ho, JP
Hon Alan LEONG Kah-kit, SC

Member absent : Hon Paul TSE Wai-chun, JP (Deputy Chairman)

Public Officers attending : Item I
Constitutional and Mainland Affairs Bureau
Miss Adeline WONG
Under Secretary for Constitutional and
Mainland Affairs

Mr Arthur HO
Deputy Secretary for Constitutional and
Mainland Affairs

Mrs Philomena LEUNG
Principal Assistant Secretary for Constitutional and
Mainland Affairs

Department of Justice

Ms Mabel CHEUNG
Senior Government Counsel

Clerk in attendance : Mr Thomas WONG
Chief Council Secretary (2) 2

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

Miss Carrie WONG
Assistant Legal Adviser 4

Ms Catherina YU
Senior Council Secretary (2)6

Miss Emma CHEUNG
Legislative Assistant (2)2

Action

I. Meeting with the Administration
[LC Paper No. CB(2)761/11-12(01)]

Members noted the submission of the Hong Kong Bar Association on the Bill [LC Paper No. CB(2)750/11-12(01)] and the Administration's written response to issues raised at the meetings on 7 and 13 December 2011 [LC Paper No. CB(2)761/11-12(01)].

Clause-by-clause examination of the Bill
[LC Paper No. CB(2)237/11-12(02)]

2. The Bills Committee deliberated (index of proceedings at **Annex**).

Action

3. The Bills Committee requested the Administration to –

Clause 25 (section 47 of the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO"))

- (a) consider deleting section 47(2)(d) and expand section 47(2)(a) to include the serving of enforcement notice by the Privacy Commissioner for Personal Data;

Clause 27 (section 50 of PDPO)

- (b) clarify how the enforcement notice could deal with a contravention which by its nature had no continuity effect or could not be rectified retrospectively or was not likely to be repeated;

Clause 28 (section 50A of PDPO)

- (c) provide justifications for the penalties under the proposed new sections 50A(1) and 50A(3), and consider stepping up the penalty for offences under section 50A(3) to the same level as proposed in section 50A(1)(b);

Clause 28 (section 50B of PDPO)

- (d) provide the precedents, if any, for sentencing imprisonment on conviction for contravention of an enforcement notice by an organization; and
- (e) provide information on "any other person" in the proposed new section 50B(1).

II. Any other business

Next meeting

4. Members noted that the next meeting would be held on 31 January 2012 at 4:30 pm.

5. There being no other business, the meeting ended at 4:30 pm.

**Proceedings of the sixth meeting of the
Bills Committee on Personal Data (Privacy)(Amendment) Bill 2011
on Monday, 9 January 2012, at 2:30 pm
in Conference Room 2A of the Legislative Council Complex**

Time marker	Speaker	Subject	Action required
000138-000219	Chairman	Opening remarks	
000220-001128	Chairman Admin Ms Emily LAU	<p><u>Clause-by-clause examination of the Bill</u> Marked-up copy of the Bill [LC Paper No. CB(2)237/11-12(02)]</p> <p><u>Clause 25</u> (section 47 of the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO"))</p> <p>The Administration's explanation on its proposed amendments to section 47 and its response to the view of the Hong Kong Bar Association ("HKBA") on the proposed new sections 47(2A) and 47(3A) [LC Paper No. CB(2)898/11-12(01)].</p>	
001129-001159	Admin	<p><u>Clause 26</u> (section 48 of PDPO)</p> <p>The Administration's explanation on its proposed amendments to section 48(3).</p>	
001160-001820	Admin Chairman SALA2	<p><u>Clause 27</u> (section 50 of PDPO)</p> <p>The Administration's briefing on its response to the view of the Privacy Commissioner for Personal Data ("PCPD") on the proposed new section 50(1A)(c) [LC Paper No. CB(2)569/11-12(02)].</p>	
001821-002826	Chairman Mr James TO Admin SALA2	<p><u>Clause 25</u> (section 47 of PDPO)</p> <p>Mr James TO's view that it was unnecessary for PCPD to inform the data user whether or not he had decided to serve an enforcement notice in consequence of the investigation. His suggestion for the Administration to consider deleting section 47(2)(d) and expanding section 47(2)(a) to include the serving of enforcement notice by PCPD.</p> <p>The Administration's explanation that currently PCPD would inform data user whether an</p>	Admin (paragraph 3(a) of the minutes)

Time marker	Speaker	Subject	Action required
		<p>enforcement notice would be served. The Chairman shared the Administration's view that PCPD had the obligation to do so.</p> <p>The Administration's response to SALA2's enquiry that PCPD might still serve an enforcement notice in the absence of the proposed new section 47(2A) should the word "proposes" be replaced by "has decided" in section 47(2)(d). Members noted that the proposal to add section 47(2A) to the Bill was made in response to PCPD's request and for clarify sake.</p>	
002827-005310	<p>Chairman Ms Emily LAU Admin Mr James TO SALA2</p>	<p><u>Clauses 27 and 28</u> (sections 50 and 50A of PDPO)</p> <p>In response to Ms Emily LAU's request, the Administration elaborated on the justifications for the proposed amendments to sections 50 and 50A.</p> <p>Mr James TO's view that the penalty for a second and subsequent conviction relating to enforcement notices should be heavier than that for the first conviction.</p> <p>Mr James TO's enquiry on whether a second conviction in section 50A(1)(b) referred to the same offence under the first conviction in section 50A(1)(a). His view that "second or subsequent conviction" in section 50A(1) should be clearly defined so that the same contravention by a data subject after having complied with the enforcement notice would be regarded as a second or subsequent conviction and hence a heavier penalty for these convictions.</p> <p>The Administration's explanation that –</p> <p>(a) under PDPO, certain non-compliance with the requirements under PDPO was not an offence and PCPD could only serve enforcement notices to non-compliant persons. If a data user had complied with the enforcement notice but subsequently did the same act or made the same omission in contravention of the requirement under PDPO intentionally, PCPD could only serve another enforcement notice to him/her. The proposed new section 50A(3) sought to make such acts offences with a view to enhancing the deterrent effect; and</p>	

Time marker	Speaker	Subject	Action required
		<p>(b) under the proposed new section 50A(1), the maximum penalty for a second or subsequent conviction was \$100,000, which was two times the maximum penalty for the first conviction. Having considered that a two-year imprisonment was already a heavy penalty, it was not proposed to increase the year of imprisonment for a second or subsequent conviction.</p> <p>Mr James TO's view that an enforcement notice should have an indefinite binding effect on certain acts and hence no room for repeated contravention for such acts. The proposed new section 50A(3) was in effect not applicable. The Chairman's concurrence with Mr James TO's view.</p> <p>SALA2's view that the definitions of "first conviction" and "second or subsequent conviction" under the proposed new section 50A(1) were unclear and there should not be any continuous offence as a data user had to take the steps on or before the date specified in an enforcement notice. His enquiry on the meaning of continuous offence under the proposed new section 50A(1)(a)(ii).</p> <p>The Administration's explanation that should a data user fail to take corrective actions for his/her contravention by the date specified in an enforcement notice, he/she would be liable to a fine at level 5 and to imprisonment for 2 years (i.e. a first conviction under section 50A(1)(a)(i)). If the offence continued, the data user would be liable to a daily penalty of \$1,000 (i.e. a continuous offence under section 50A(1)(a)(ii)). For any subsequent contravention of an enforcement notice which might not be the same act as the previous contravention, the penalty in the proposed section 50A(1)(b) would apply. For any subsequent and intentional contravention of a PDPO requirement (in respect of an enforcement notice which had been issued and complied with earlier), the proposed new section 50A(3) would apply.</p> <p>The Administration was requested to clarify how the enforcement notice could deal with a contravention which by its nature had no continuity effect or could not be rectified retrospectively or was not likely to be repeated.</p>	<p>Admin (paragraph 3(b) of the minutes)</p>

Time marker	Speaker	Subject	Action required
005311-010436	Chairman Mr James TO SALA2 Admin	In response to SALA2's enquiry, the Administration explained that with the introduction of the proposed new section 50A(3), PCPD would not need to serve a new enforcement notice on a data user who had complied with an enforcement notice previously served on him/her but subsequently did the same act in contravention of the requirements in PDPO as specified in that previous enforcement notice. PCPD could take legal action against the data user concerned.	
010437-011356	Chairman Ms Cyd HO Admin	<p>At Ms Cyd HO's request, the Administration provided scenarios where the proposed new sections 50A(1) and (3) would apply.</p> <p>In response to Ms Cyd HO's enquiry, the Administration explained that the use of personal data in direct marketing was regulated under section 34 of PDPO and any contravention of the provisions under section 34 would be a criminal offence.</p> <p>The Chairman's enquiry on whether an organization or its employees would be held accountable in case of contravention of an enforcement notice.</p> <p>The Administration's response that legal actions would be taken against the organization concerned as it was the data user. Whether an employee would be liable would depend on the case and the judgment of the court.</p>	
011357-011540	Chairman Mr WONG Ting-kwong Admin	In response to Mr WONG Ting-kwong's enquiry, the Administration explained that the proposed new section 50A(3) would be applicable when a data user made the same contravention. The application of section 50A(1) might not necessarily be the same contravention.	
011541-012011	SALA2 Admin Ms Emily LAU	<p>SALA2's enquiry on the reasons for different penalties proposed under sections 50A(1)(b) and 50A(3), although both sections dealt with repeated offences.</p> <p>The Administration's response that section 50A(1)(b) referred to numerous repeated offences and therefore a heavier penalty was proposed.</p>	
012012-012157	Mr WONG Ting-kwong Admin	The Administration's response to Mr WONG Ting-kwong's enquiry that should a branch of an organization contravene an enforcement	

Time marker	Speaker	Subject	Action required
		notice, legal action would be taken against the head office as it was the body corporate of the organization.	
012158-012557	Ms Emily LAU Admin	<p>Ms Emily LAU's enquiry on the validity of an enforcement notice.</p> <p>The Administration's explanation that an enforcement notice would be null once the data user had complied with the requirements therein. As many organizations would handle personal data in their day to day operation, making contravention of the data protection principles an offence might have great impact on them.</p> <p>Ms Emily LAU's view that enforcement notices should be valid indefinitely to preclude repeated offences.</p> <p>The Administration's response that the proposed new section 50A(3) aimed at addressing Ms Emily LAU's concern over repeated offences.</p>	
012558-013111	Ms Cyd HO Admin Chairman SALA2 Ms Emily LAU	<p>Ms Cyd HO's view that it was illogical that the penalty for data users who intentionally made the same contravention having complied with an enforcement notice was lighter than a second or subsequent conviction.</p> <p>The Administration was requested to provide justifications for the penalties under the proposed new sections 50A(1) and 50A(3), and consider stepping up the penalty for offences under section 50A(3) to the same level as proposed in section 50A(1)(b).</p>	Admin (paragraph 3(c) of the minutes)
013112-013520	Chairman Ms Emily LAU Admin SALA2	<p>The Administration's briefing on its response on the view of the Law Society of Hong Kong and HKBA on the proposed new section 50A [LC Paper Nos. CB(2)569/11-12(02) and CB(2)898/11-12(01)].</p> <p>SALA2's response to Ms Emily LAU's enquiry that the proposed penalties served as an indicator for the court in passing sentence. The number of tiers for penalties would depend on the policy intention.</p>	
013521-014017	Ms Cyd HO SALA2 Chairman Admin	SALA2's response to Ms Cyd HO's enquiry that while there were provisions concerning civil liability in PDPO, it had no provision stipulating criminal liability.	

Time marker	Speaker	Subject	Action required
		Ms Cyd HO's request for the Administration to provide the precedents, if any, for sentencing imprisonment on conviction for the contravention of an enforcement notice by an organization.	Admin (paragraph 3(d) of the minutes)
014018-014417	Admin Chairman	<u>Clause 28</u> (section 50B of PDPO) The Administration's briefing on its response to the view of the Hong Kong Association of Banks ("HKAB") and HKBA on the proposed new sections 50B(1) and 50B(1)(b) respectively [LC Paper Nos. CB(2)569/11-12(02) and CB(2)898/11-12(01)].	
014418-014947	Chairman SALA2 Admin Ms Cyd HO	SALA2's enquiry on to whom "any other person" in the proposed new section 50B(1) referred aside from the prescribed officers. The Administration's response that "any other person" would be the persons who assisted PCPD to perform his functions. Ms Cyd HO's view that - (a) as severe penalty was suggested for offences under section 50B(1), "any other person" in section 50B(1) should be clearly defined; and (b) "any other person" in section 50B(1) should be at a reasonably senior rank as they were authorized to carry out the functions or exercise the powers of PCPD. The Administration's undertaking to provide information on "any other person" in the proposed new section 50B(1).	Admin (paragraph 3(e) of the minutes)
014948-015135	Admin	<u>Clause 29</u> (section 51A); sections 54 and 57 of <u>PDPO</u> The Administration's explanation on proposed amendments to sections 51A, 54 and 57.	
015136-015617	Ms Cyd HO Chairman Admin SALA2 Ms Emily LAU	<u>Clause 30</u> (section 58 of PDPO) The Administration's response to Ms Cyd HO's enquiry that section 58 stipulated the exemptions from the provisions of data protection principles 3 and 6. The Administration's briefing on its response on HKAB's view on the proposed new section 58(6) [LC Paper No. CB(2)569/11-12(02)].	

Time marker	Speaker	Subject	Action required
015618-015719	Chairman	Date of next meeting	

Council Business Division 2
Legislative Council Secretariat
12 September 2012