

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

**Responses to Issues Raised at Meetings  
on 7 and 13 December 2011**

This paper provides responses to some of the issues raised at the meetings on 7 and 13 December 2011.

**Long title**

2. At the meeting on 7 December 2011, the following queries relating to the long title were raised:

- (a) whether it was appropriate to set out in the long title of the Personal Data (Privacy) (Amendment) Bill 2011 (“the Bill”) a detailed list of the subject matters covered by the Bill; and
- (b) whether there was a trend for longer and more detailed long titles.

3. The long title of a Bill should be drafted in terms wide enough to embrace the whole of the contents of a Bill.<sup>1</sup> The length of, and the level of details to be provided in, the long title of a Bill, have to be decided by reference to the context of each case.

4. The long title of the Bill sets out the major subject matters covered by the Bill. The Bill introduces a wide range of substantive amendments to the Personal Data (Privacy) Ordinance (“PDPO”) (Cap. 486) (for example, regulation of use of personal data in direct marketing and sale of personal data, creation of a new offence for disclosure of personal data obtained without consent, giving new powers to the Privacy Commissioner for Personal Data (“PCPD”), providing for new exemptions and adding new provisions to data protection principles). These are substantive amendments but they do not have a common theme. To give users a clear idea of the contents of the Bill, it is considered appropriate to set out the major subject matters in the long title. A general statement like “A Bill to amend the Personal Data (Privacy) Ordinance” is not helpful to users.

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<sup>1</sup> See G. C. Thornton, *Legislative Drafting* (4th ed) p.194

5. It is worth mentioning that the paragraphs in the Explanatory Memorandum are also arranged according to the sequence of subject matters as set out in the long title, and not according to the sequence of clauses as they appear in the Bill. This will give users a better idea and understanding of the legislative proposals introduced by the Bill.

## Section 2

6. At the meeting on 7 December 2011, the following queries relating to section 2 were raised:

- (a) whether it was appropriate to change the word “data” from the plural form to the collective uncountable form; and
- (b) whether it was appropriate to use the term “rule of law”.

7. “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 an uncountable noun (similar to words such as “information”), taking a singular verb. This usage is widely accepted as standard English (*see The Concise Oxford Dictionary (eleventh edition (revised) 2006)*). “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.

8. To reflect the increasingly dominant contemporary use of “data” as an uncountable noun, we consider it desirable to change the related verbs in the PDPO to the singular form.

9. The term “rule of law” carries various meanings. **The** “rule of law” is the legal doctrine that the society should be governed in accordance with the law and not arbitrarily, and that all persons are subject to the law. **A** “rule of law”, on the other hand, means a ruling or a principle on a point of law. The term is used in the latter sense in the Bill (see the proposed s.35R(4)(b) and s.66A(5)) and the proposed definition is adapted from the definition of “rule of law” in section 2 of the Electronic Transactions Ordinance (Cap. 553).

10. The term “rule of law” is commonly used in the latter sense in the legislation of other jurisdictions. For example, the Privacy Act 1993 (which governs data protection) in New Zealand and the Data Protection Act 1998 (which governs data protection) in the United Kingdom contain references to the term. The relevant provisions are set out in **Annex 1**.

11. The term is also commonly used to refer to a ruling or a principle on a point of law in the legislation of Hong Kong. Some examples are set out in **Annex 2**.

### **Section 11A**

12. At the meeting on 13 December 2011, the Administration was asked, in relation to section 11A:

- (a) to provide reference for the immunity provision in the proposed section 11A; and
- (b) to explain the difference between the proposed section and section 18A of The Ombudsman Ordinance (Cap.397).

13. The proposed new section 11A is modelled after section 68 of the Sex Discrimination Ordinance (Cap. 480) (copy at **Annex 3**). Subsection (1) of both sections (i.e. the proposed new section 11A of the PDPO and section 68 of the Sex Discrimination Ordinance) provide that the persons employed or engaged to carry out the functions of the PCPD/Equal Opportunities Commission do not incur civil liability for anything done or omitted to be done in good faith in carrying out those functions. Subsection (2) of both sections provides that the civil liability of the PCPD/Equal Opportunities Commission, as a body corporate, for anything done or omitted to be done is not affected.

14. Under the PDPO, “Commissioner” refers to both the office by the name of the “Privacy Commissioner for Personal Data” which is a corporation sole and the person appointed to take up the office. To avoid confusion, subsection (1) of the proposed new section 11A refers to “the person appointed to be the Commissioner” while subsection (2) refers to “the Commissioner as a corporation sole”.

15. Section 18A of the Ombudsman Ordinance (Cap. 397) (copy at Annex 4) provides for immunity from personal civil liability in respect of acts done or omitted to be done by any person in good faith in the performance of the functions under that Ordinance. It does not contain a subsection setting out the position of the Ombudsman as a corporation sole. It is considered appropriate, for clarity purpose, to have a subsection in the proposed new section 11A that expressly provides that subsection (1) does not affect the position of the PCPD, as a corporation sole, regarding civil liability.

## **Section 18**

16. At the meeting on 13 December 2011, the following query relating to section 18 was raised:

whether the phrase “having the data user – (a) informing the person whether the data user holds any personal data which is the subject of the request; and (b) if applicable, supplying a copy of the data.” in the proposed new section 18(5) should be reviewed.

17. We will move a Committee Stage Amendment to change the phrase to “having the data user – (a) inform the person whether the data user holds any personal data which is the subject of the request; and (b) if applicable, supply a copy of the data.” in the proposed new section 18(5).

18. We will provide responses to other issues raised separately.

**Constitutional and Mainland Affairs Bureau**  
**Department of Justice**  
**January 2012**

**Examples of provisions containing references  
to the term “rule of law” in legislation of other jurisdictions**

**Privacy Act 1993 (New Zealand)**

**20. Powers relating to declaratory judgments**

- (2) In respect of any matter referred to the Proceedings Commissioner under subsection (1), the Proceedings Commissioner shall, notwithstanding anything to the contrary in the Declaratory Judgements Act 1908 or any other enactment or rule of law, have sufficient standing to institute proceedings under that Act whether or not the matter is one within his or her own functions and powers under this Act or under the Human Rights Commission Act 1977.

**100. Use of results of information matching programme**

- (1) Subject to any other enactment or rule of law that limits or restricts the information that may be taken into account in taking adverse action against an individual, any specified agency that is involved in an authorised information matching programme may take adverse action against an individual on the basis of any discrepancy produced by that programme.

**119. Exclusion of public interest immunity**

- (1) Subject to subsection (2), the rule of law which authorises or requires the withholding of any document, or the refusal to answer any question, on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest shall not apply in respect of—
- (a) any investigation by or proceedings before the Commissioner or the Tribunal under this Act; or
  - (b) any application under section 4(1) of the Judicature Amendment Act 1972 for the review of any decision under this Act;—
- but not so as to give any party any information that he or she would not, apart from this section, be entitled to.

**Data Protection Act 1998 (United Kingdom)**

**35. Disclosures required by law or made in connection with legal proceedings etc.**

- (1) Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of a court.

**55. Unlawful obtaining etc. of personal data**

- (2) Subsection (1) does not apply to a person who shows—
- (a) that the obtaining, disclosing or procuring—
    - (i) was necessary for the purpose of preventing or detecting crime, or
    - (ii) was required or authorised by or under any enactment, by any rule of law or by the order of a court,

**56. Prohibition of requirement as to production of certain records**

- (3) Subsections (1) and (2) do not apply to a person who shows—
- (a) that the imposition of the requirement was required or authorised by or under any enactment, by any rule of law or by the order of a court, or

**58. Disclosure of information**

No enactment or rule of law prohibiting or restricting the disclosure of information shall preclude a person from furnishing the Commissioner or the Tribunal with any information necessary for the discharge of their functions under this Act.

**Examples of provisions containing references  
to the term “rule of law” in Ordinances**

Trustee Ordinance (Cap. 29) s.27(1)

(1) Notwithstanding any rule of law or equity to the contrary, a trustee may, by power of attorney, delegate for a period not exceeding 12 months the execution or exercise of all or any of the trusts, powers and discretions vested in him as trustee either alone or jointly with any other person or persons.

Prevention of Bribery Ordinance (Cap. 201) s.22

Notwithstanding any Ordinance, rule of law or practice to the contrary, no witness shall, in any proceedings for an offence under Part II, be regarded as an accomplice by reason only of any payment or delivery by him or on his behalf of any advantage to the person accused or, as the case may be, by reason only of any payment or delivery of any advantage by or on behalf of the person accused to him.

Adoption Ordinance (Cap. 290) s.16(1)

(1) Notwithstanding any rule of law, a disposition made by will or codicil executed before the date of an adoption order shall not be treated for the purposes of section 15 as made after that date by reason only that the will or codicil is confirmed by a codicil executed after that date.

Plant Varieties Protection Ordinance (Cap. 490) s.33(1)

(1) Notwithstanding any rule of law to the contrary, an appellant may begin and carry on an appeal in the court under this Part by a solicitor or in person.

Trade Marks Ordinance (Cap. 559) s.70(1)

(1) Without prejudice to any rule of law or to any provision of this Ordinance requiring the Registrar to hear any party to proceedings before him, or to give any such party an opportunity to be heard, the Registrar shall, before taking any decision on any matter under this Ordinance or the rules which is or may be adverse to any party to any proceedings before him, give that party an opportunity to be heard.

Securities and Futures Ordinance (Cap. 571) s.54(1)

(1) A court shall not, pursuant to any enactment or rule of law, recognize or give effect to-

- (a) an order of a court exercising jurisdiction under the law of insolvency in a place outside Hong Kong; or
- (b) an act of a person appointed in that place to perform a function under the law of insolvency there,

in so far as making the order or doing the act would be prohibited in the case of a court in Hong Kong or a relevant office-holder by provisions made by or under this Ordinance.

Village Representative Election Ordinance (Cap. 576) s.60(2)

(2) This Part has effect notwithstanding any other enactment or rule of law.

Land Titles Ordinance (Cap. 585) s.56

Nothing in this Ordinance shall be construed as altering any rule of law which implies in the grant or reservation of an easement such ancillary rights as are necessary for effective enjoyment of the easement.

Unsolicited Electronic Messages Ordinance (Cap. 593 s.57(8))

(8) For the avoidance of doubt, nothing in this section affects, limits or diminishes any rights, privileges, obligations or liabilities conferred or imposed on a person under any other enactment or rule of law.

Arbitration Ordinance(Cap. 609) s.22(2)

(2) Subsection (1) does not affect the operation of any enactment or rule of law by virtue of which a substantive right or obligation is extinguished by death.

**Annex 3**

**Sex Discrimination Ordinance (Cap. 480) section 68**

(1) No person to whom this subsection applies, acting in good faith, shall be personally liable in damages for any act done or default made in the performance or purported performance of any function, or the exercise or purported exercise of any power, imposed or conferred on the Commission under this Ordinance.

(2) The protection conferred under subsection (1) on any person to whom that subsection applies in respect of any act or default shall not in any way affect the liability of the Commission for that act or default.

- (3) The persons to whom subsection (1) applies are –
- (a) any member of the Commission or a committee;
  - (b) any employee of the Commission;
  - (c) any conciliator.

**Annex 4**

**The Ombudsman Ordinance (Cap. 397) section 18A**

No person acting in good faith shall be personally liable for any civil liability or claim whatever in respect of any act done or omitted to be done in the performance or purported performance of any function, or the exercise or purported exercise of any power, under this Ordinance.