

立法會
Legislative Council

LC Paper No. CB(2)2825/11-12
(These minutes have been seen
by the Administration)

Ref : CB2/BC/8/10

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

Minutes of the eighth meeting
held on Tuesday, 7 February 2012, at 10:45 am
in Conference Room 3 of the Legislative Council Complex

Members present : Dr Hon Philip WONG Yu-hong, GBS (Chairman)
Hon Paul TSE Wai-chun, JP (Deputy Chairman)
Hon James TO Kun-sun
Hon TAM Yiu-chung, GBS, JP
Hon WONG Kwok-hing, MH
Hon WONG Ting-kwong, BBS, JP
Hon Ronny TONG Ka-wah, SC
Hon CHAN Kin-por, JP
Dr Hon Samson TAM Wai-ho, JP
Hon Alan LEONG Kah-kit, SC

Members absent : Hon Emily LAU Wai-hing, JP
Hon Vincent FANG Kang, SBS, JP
Hon Cyd HO Sau-lan
Dr Hon Priscilla LEUNG Mei-fun, JP
Hon IP Kwok-him, GBS, JP

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

Clause-by-clause examination of the Bill

[LC Paper Nos. CB(3)1032/10-11, CB(2)237/11-12(02),
CB(2)569/11-12(02) and CB(2)898/11-12(01)]

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

2. The Bills Committee requested the Administration to review the need for allowing remedies that were obtainable in the Court of First Instance to be obtainable in respect of proceedings brought in the District Court as provided for in the proposed new section 66(5) and consider amending the proposed new section 66(5).

Action

II. Any other business

Next meeting

3. Members noted that the next meeting would be held on 14 February 2012 at 10:45 am.
4. There being no other business, the meeting ended at 12:30 pm.

Council Business Division 2
Legislative Council Secretariat
24 September 2012

**Proceedings of the eighth meeting of the
Bills Committee on Personal Data (Privacy)(Amendment) Bill 2011
on Tuesday, 7 February 2012, at 10:45 am
in Conference Room 3 of the Legislative Council Complex**

Time marker	Speaker	Subject	Action required
000728 – 000802	Chairman	Opening remarks	
000803 – 002643	Chairman Admin Mr James TO SALA2	<p><u>Clause-by-clause examination of the Bill</u> [LC Paper Nos. CB(3)1032/10-11 and CB(2)237/11-12(02)]</p> <p><u>Clause 35</u> (section 64 of Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO"))</p> <p>Members noted the Administration's written response to the Hong Kong Association of Banks ("HKAB")'s suggested amendment to the proposed new section 64(2).</p> <p>The Administration's view that the amendment would render the scope of the proposed new section 64 imprecise [LC paper No. CB(2)569/11-12(02)].</p> <p>The Administration's response to Mr James TO's enquiry that the offences covered by the proposed new section 64 were the same as those under the current section 64 of PDPO. Section 64(2)(c) covered offences relating to the sale of personal data and use of personal data in direct marketing under sections 35B(1), 35H(1) and 35N(1) of PDPO. The Administration's undertaking to revert to the Bills Committee if amendments were made to the aforesaid provisions.</p> <p>Mr James TO's concern about the sufficiency of the deterrent effect of the proposed new section 64(1) which did not provide for a penalty of imprisonment against data users who committed the offence under the provision. His suggestion that the proposed new section 64(1) should provide for imprisonment against repeated offenders to enhance deterrence.</p> <p>The Administration's response that the proposed new section 64(1) was essentially equivalent to the current section 64(10) of PDPO, which also did not provide for imprisonment.</p>	

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002644 - 002845	Admin Chairman	<p><u>Clause 36</u> (section 64A of PDPO)</p> <p>Members noted the Administration's written response to the views of the Hong Kong Retail Management Association and Hong Kong Bar Association ("HKBA") on the proposed new section 64A, which proposed to extend the time limit for laying a complaint or information in respect of an offence under PDPO from six months to two years from the date of commission of the offence [LC paper Nos. CB(2)569/11-12(02) and CB(2)898/11-12(01)].</p> <p>The Administration's view that the extension of the time limit was necessary to provide sufficient time for the Privacy Commissioner for Personal Data ("PCPD"), the Police and the Department of Justice to conduct investigation and institute prosecution as necessary.</p>	
002846 – 010720	Admin Chairman SALA2 Mr James TO Mr Paul TSE Mr Alan LEONG	<p><u>Clause 37</u> (section 66 of PDPO)</p> <p>Members noted that under the current section 66(1) of PDPO, a data subject who suffered damage by reason of a contravention of a requirement under PDPO, by a data user, and which related to a personal data of the data subject, would be entitled to compensation from the data user for that damage.</p> <p>The Administration's view that at present, the District Court could deal with claims ranging from \$50,000 to \$1,000,000. By virtue of the proposed new section 66(5), which provided that proceedings brought by a data subject in reliance on section 66(1) were to be brought in the District Court but all such remedies were obtainable in those proceedings as would be obtainable in the Court of First Instance, the District Court might deal with claims exceeding \$1,000,000 in proceedings brought by a data subject in reliance on section 66(1) of PDPO.</p> <p>Mr James TO's concern about the need for extending the civil jurisdiction of the District Court to deal with claims exceeding \$1,000,000 from data subjects. His view that there had been very few such claims and it should be more appropriate for them to remain within the civil jurisdiction of the Court of First Instance. His suggestion that PDPO should clearly stipulate that claims not exceeding \$50,000, ranging from \$50,000 to \$1,000,000 and exceeding \$1,000,000 would be dealt with by the Small Claims Tribunal, the District Court and the Court of First Instance respectively.</p>	

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		<p>Mr Alan LEONG's concern about whether the proposed arrangement under new section 66(5) was the best option. His suggestion of clearly stipulating the respective jurisdictions of the District Court and the Court of First Instance on claims made under section 66(1).</p> <p>Mr Paul TSE's view that the new section 66(5) was reasonable and appropriate and allowed flexibility for aggrieved data subjects to pursue their claims in a less costly manner. His interpretation of new section 66(5) that it would only be invoked when necessary and would not affect the inherent jurisdiction of the Court of First Instance.</p> <p>The Administration's response that –</p> <ul style="list-style-type: none"> (a) the proposed PCPD's legal assistance to data subjects, including the provision in the proposed new section 66(5), was modeled on the Equal Opportunities Commission ("EOC")'s legal assistance scheme, which had been implemented smoothly and effectively; and (b) the new section 66(5) could expedite the process of handling claims exceeding \$1,000,000, as they did not have to be transferred to the Court of First Instance, and afford fairness to individual aggrieved data subjects with fewer financial resources than data users, as the legal costs of the proceedings in the District Court were lower than those in the Court of First Instance. <p>Mr James TO's enquiry on whether the claims made under section 66 did not include small claims not exceeding \$50,000 and claims exceeding \$1,000,000. SALA2's view that it appeared that section 66 should not cover those two types of claims.</p> <p>Mr James TO's objection to the proposed new section 66(5), as claims not exceeding \$50,000, which could originally be handled by the Small Claims Tribunal, had to be brought in the District Court and consequently, aggrieved data subjects might have to bear possible higher legal costs.</p> <p>SALA2's enquiry on the policy justifications for new section 66(5) and whether the public had been consulted on the proposal.</p> <p>The Administration's response that as stated in its Report on Further Public Discussions on</p>	

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		<p>Review of the PDPO ("the Report") issued in April 2011, the legal assistance to be provided by PCPD would follow the model of EOC's legal assistance scheme. Paragraph 3.104 of the Report also stated that "proceedings under section 66 shall be brought in the District Court".</p> <p>Members' request for the Administration to review the need for allowing remedies that were obtainable in the Court of First Instance to be obtainable in respect of proceedings brought in the District Court as provided for in the proposed new section 66(5) and consider amending the proposed new section 66(5).</p> <p><u>Clause 38</u> (section 66A(2)(b) of PDPO)</p> <p>The Administration's proposed amendment to replace the wrong word "鑠" with the right word "爍" in the Chinese version of the proposed new section 66A(2)(b).</p>	<p>Admin (paragraph 2 of the minutes)</p>
<p>010721 - 014434</p>	<p>Mr James TO Chairman Admin Mr Paul TSE Mr CHAN Kin-por SALA2</p>	<p><u>Clause 38</u> (section 66A of PDPO)</p> <p>Members noted the Administration's disagreement with HKBA's view on the proposed new section 66A [LC Paper No. CB(2)898/11-12(01)].</p> <p>Given the definition of "prescribed" in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1), SALA2's enquiry on whether new section 66A(1) under which PCPD might "prescribe" forms had to be commenced by subsidiary legislation.</p> <p>The Administration's response that the provision would be commenced by subsidiary legislation, which would be subject to the Legislative Council's scrutiny by way of negative vetting. This arrangement would also apply to the proposed new section 66A(3) under which PCPD might prescribe the period within which questions had to be served and the manner in which a question and any reply by the respondent might be served.</p> <p><u>Clause 38</u> (section 66A(2) of PDPO)</p> <p>In connection with the proposed new section 66A(2) which provided that if the person aggrieved questioned the respondent (whether or not in accordance with a form prescribed by PCPD under the proposed new section 66A(1)), the question and any reply by the respondent (whether or not in accordance with such a form)</p>	

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		<p>were, subject to new sections 66A(3), (4) and (5), admissible as evidence in the proceedings, Mr James TO's concern about why the aggrieved person and the respondent would be given discretion to choose whether to provide the questions and the replies in accordance with the forms prescribed by PCPD.</p> <p>Mr James TO's view that –</p> <ul style="list-style-type: none"> (a) the admissibility of the respondent's reply might be undermined if the reply was not in accordance with PCPD's prescribed form and the respondent was not aware of the warning statement/reminder, if any, in the form; and (b) a mandatory requirement for the respondent to reply in accordance with PCPD's prescribed form would facilitate the respondent to present his or her case in a more formal and effective manner, prevent the respondent from providing an evasive or equivocal reply and help the aggrieved person to decide whether to institute proceedings under section 66 of PDPO. <p>Mr James TO's suggestion of deleting "whether or not in accordance with a form referred to in subsection (1)" from the proposed new section 66A(2) and clearly stipulating in PDPO that a respondent's refusal to reply in accordance with PCPD's prescribed form might bring the respondent in a disadvantaged position, such as the situation stated in the proposed new section 66A(2)(b), which provided that if it appeared to the District Court that the respondent's reply was evasive or equivocal, the Court might draw any inference from that fact it considered just and equitable to draw.</p> <p>The Administration's response that it should be the responsibility of an individual to understand the legal requirements in the case of any legal proceedings.</p> <p>Mr Paul TSE's view that it was no harm but not a must to elaborate the proposed new section 66A as suggested by Mr James TO.</p> <p>The Administration's response that it was necessary to retain the phrase "whether or not in accordance with a form referred to in subsection (1)" in the proposed new section 66A(2) as deleting the phrase would make it unclear whether the provision would be applicable to cases where the prescribed form had not been used. The Administration's remarks that</p>	

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		<p>although EOC did not prescribe any forms, it had effectively provided the required assistance to aggrieved persons.</p> <p>Mr James TO's view that the purpose of the prescribed form was to help a person to present his/her case in the most effective manner in case of legal proceedings. EOC would fail to discharge its duty if it did not provide such forms.</p> <p>The Administration's clarification that EOC was not mandated by law to provide the prescribed forms. Under the relevant ordinance, EOC might prescribe forms to facilitate members of the public.</p> <p>Mr Paul TSE's declaration that he was a member of EOC. His comments on EOC's endeavour in providing assistance to members of the public, including giving advice to aggrieved persons in preparing his/her case.</p> <p>SALA2's view that –</p> <ul style="list-style-type: none"> (a) while a form prescribed by PCPD might help an individual to formulate and present his/her case in the most effective manner in case of legal proceedings, it had no direct relationship with the major policy intent of new section 66A; (b) the court would draw inference from that fact it considered just and equitable to draw; and (c) it might be worth looking into whether EOC had effectively provided the required assistance to members of the public in the absence of prescribed forms. <p>The Administration's concurrence with SALA2's view.</p> <p>Mr James TO's reiteration that PCPD should provide prescribed forms to fulfill the objective of helping aggrieved persons in presenting his/her case in the most effective manner.</p>	
014435 – 014443	Chairman	Date of next meeting	