

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

Responses to Issues raised by the Bills Committee

This paper provides responses to the outstanding issues raised at previous Bills Committee meetings, as well as the questions on the proposed amendments to section 59 and the proposed new section 63D raised at the meeting on 26 March 2012.

Issues Raised at Previous Meetings

Section 47

2. At the meeting on 9 January 2012, in relation to section 47, the Administration was asked to consider whether the proposed new section 47(2A) on the serving of enforcement notice by the Privacy Commissioner for Personal Data (“PCPD”) would suffice and the existing section 47(2)(d) would be unnecessary.

3. Section 47(2) sets out the obligations of the PCPD on the completion of an investigation. The proposed amendment to section 47(2)(d) (i.e. replacing “proposes” with “has decided”) is to improve the drafting. Section 47(2)(d) requires the PCPD to inform the relevant data user whether or not he has decided to serve an enforcement notice on the relevant data user on the completion of an investigation. This requirement is necessary since otherwise the PCPD does not have to inform the data user whether or not he has decided to serve an enforcement notice and the data user will be left in a state of uncertainty. The proposed new section 47(2A) relates to the timing of the serving of an enforcement notice – it provides that the PCPD may serve the enforcement notice on the relevant data user at the same time when informing the relevant data user of the matters relating to the investigation under section 47(2).

Section 50

4. At the meeting on 9 January 2012, in relation to section 50, the Administration was asked to clarify whether an enforcement notice stipulating the remedial steps to be taken by the data user within the period specified in the notice could direct the data user not to do the act or make the omission

occasioning the issue of the enforcement notice after the expiry of the specified period.

5. Under the existing Personal Data (Privacy) Ordinance (“PDPO”), the relevant data user must take the steps to remedy the contravention specified in an enforcement notice within the period specified in the notice. Failure to do so will be an offence. To tighten up the regulatory regime, we propose to add new section 50A(3) to make it an offence for a data user to, having complied with an enforcement notice, intentionally do the same act or make the same omission occasioning the issue of the enforcement notice. The penalty will be a fine at level 5 and imprisonment for 2 years; and if the offence continues after the conviction, a daily fine of \$1,000.

Section 66

6. At the meeting on 7 February 2012, the Administration was asked to elaborate on the rationale for allowing remedies that are 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).

7. The proposed new section 66(5) is modelled after similar provisions in the anti-discrimination ordinances (at **Annex**).

8. Under the proposed new section 66(5), proceedings brought by an individual under the PDPO are to be brought in the District Court and remedies obtainable in the Court of First Instance will be obtainable in proceedings brought in the District Court. This can facilitate the building up of expertise in the District Court, facilitate speedy handling of cases and avoid potentially huge legal cost on the part of the data subject. Data subjects will also have a clear idea as to the forum where proceedings should be instituted.

New Part VIA

9. At the meeting on 26 November 2011, the Administration was requested to devise a mechanism for data subjects to request data users to provide information on each and every transferee of the data subjects’ personal data.

10. The objective of this suggestion is to afford better protection to a data subject by allowing him to require the person who uses his personal data in direct marketing to cease to use it. One of the proposals under the Personal

Data (Privacy) (Amendment) Bill 2011 (“the Bill”) is that a data user who intends to provide personal data of a data subject to a third person for use in direct marketing must inform the data subject of certain required information relating to the provision, including the class of persons to whom the data is to be provided. Also, a data subject who has been provided with the information may subsequently require the data user to notify a person to whom his/her personal data has been provided for use in direct marketing to cease to so use the personal data. The person who receives such a notification from the data user must cease to use the personal data of the data subject in direct marketing in accordance with the notification. Otherwise, the person commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years. We consider that this proposal will afford adequate protection to data subjects and there is no need to devise the suggested mechanism.

Questions Raised at Meeting on 26 March 2012

Section 59

11. At the meeting on 26 March 2012, in relation to the proposed new section 59(2), the Administration was asked to consider the need for expanding the scope of exemption from Data Protection Principle (“DPP”) 3 to cover cases where an exemption would be necessary to prevent a serious threat to the life of an individual or public safety, as in the case of some overseas legislation.

12. The serious threat to the life of an individual scenario is already covered by the proposed exemption under section 59(2) for cases where the application of DPP3 would be likely to cause serious harm to the physical or mental health of an individual. In respect of public safety, section 57 already provides for exemption for safeguarding security and defence, and section 58 for prevention or detection of crime, among other things. We consider that there is no need to provide for further exemptions.

Section 63D

13. At the meeting on 26 March 2012, in relation to the proposed new section 63D, the Administration was asked to:

- (a) consider whether the drafting of the proposed new section 63D(1) was appropriate, as it may not clearly reflect that the proposed exemption would be subject to archive purpose as defined; and

- (b) clarify whether only records of historical, research, educational or cultural interest were transferred to the Government Records Service (“GRS”) for archive purpose, whether they had to be so specified to trigger the exemption and whether there would be other records not of those interests transferred to the GRS and as such would not be able to enjoy the exemption.

14. We will move a CSA to the proposed new section 63D(1) to make clear that personal data contained in records that are transferred to the GRS is exempt from the provisions of DPP 3, when the records are used for archive purpose and delete the words “of historical, research, educational or cultural interest”.

Constitutional and Mainland Affairs Bureau
Department of Justice
April 2012

**Provisions in the anti-discrimination ordinances
similar to the proposed new section 66(5)**

Sex Discrimination Ordinance (Cap. 480)

Section 76 – Claims under Part III or IV

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- (3) Proceedings under subsection (1) shall be brought in the District Court but all such remedies shall be obtainable in such proceedings as, apart from this subsection and section 75(1), would be obtainable in the Court of First Instance.

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Disability Discrimination Ordinance (Cap. 487)

Section 72 – Claims under Part III or IV

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- (3) Proceedings under subsection (1) shall be brought in the District Court but all such remedies shall be obtainable in such proceedings as, apart from this subsection and section 71(1), would be obtainable in the Court of First Instance.

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Family Status Discrimination Ordinance (Cap. 527)

Section 54 – Claims under Part III or IV

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- (3) Proceedings under subsection (1) shall be brought in the District Court but all such remedies shall be obtainable in such proceedings as, apart from this subsection and section 53(1), would be obtainable in the Court of First

Instance.

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Race Discrimination Ordinance (Cap. 602)

Section 70 – Claims in respect of discrimination, harassment and vilification

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- (3) Proceedings under subsection (1) are to be brought in the District Court but all such remedies shall be obtainable in such proceedings as, apart from this subsection and section 69(1), would be obtainable in the Court of First Instance.

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