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Secretary General
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Hong Kong
(Attn: Ms Angel Wong)

12 August 2021

Dear Ms Wong,

**Bills Committee on Personal Data (Privacy) (Amendment)
Bill 2021**

Follow-up to the meeting on 6 August 2021

Thank you for your letter dated 9 August 2021 on the captioned matter.

Having consulted the Department of Justice and the Office of the Privacy Commissioner for Personal Data, we submit the requested information for Members' reference (see Tables 1 to 4).

Yours sincerely,

(Jacky LUM)

for Secretary for Constitutional
and Mainland Affairs

Section 66O(2) of the Amendment Bill – Defence for the Offence relating to Cessation Notice

66O. Offence relating to cessation notice

...

“(2) It is a defence for a person charged with an offence under subsection (1) in respect of a cessation notice —

- (a) the person had a reasonable excuse for contravening the cessation notice; or*
- (b) without limiting paragraph (a), it was not reasonable to expect the person to comply with the cessation notice—*
 - (i) having regard to the nature, difficulty or complexity of the cessation notice concerned;*
 - (ii) because the technology necessary for complying with the cessation notice was not reasonably available to the person;*
 - (iii) because there was a risk of incurring substantial loss to, or otherwise substantially prejudicing the right of, a third party; or*
 - (iv) because there was a risk of incurring a civil liability arising in contract, tort, equity or otherwise.”*

(A) Overseas Legislation (for reference only)

[Note: In Singapore, New Zealand and Australia, non-compliance of a removal notice may attract civil liability or fine. There is also no defence available in the aforesaid regimes. The positions in these jurisdictions are not entirely comparable to that under the Amendment Bill, where non-compliance with the cessation notice is a criminal offence. The information below provided is for reference only.]

Country	Legislation	Consequence of Non-Compliance	Defence	Relevant Texts
Singapore	<u>Protection from Harassment Act</u>	<ul style="list-style-type: none"> Breach of a Protection Order is considered as a contempt of court 	<ul style="list-style-type: none"> No express provision 	N/A

Table 1

<p>New Zealand</p>	<p>Section 19(5)(j) of the <u>Harmful Digital Communications Act 2015</u></p>	<ul style="list-style-type: none"> • Civil remedy ordered by the Court 	<ul style="list-style-type: none"> • No express provision • In considering whether a civil remedy order should be made (including the demanding of online content operators to delete the specified content), the Court must consider the technical and operational practicalities, and the costs, of an order. • <u>Allow the application to the Court for more time to comply with the order</u> According to the application form¹ of the New Zealand Courts on amending the civil remedy order, the applicant must state the reason of amending the order in the application form. Examples provided 	<p><i>“In deciding whether or not to make an order, and the form of an order, the court must take into account the following : ... (j) the <u>technical and operational practicalities</u>, and the costs, of an order ...”</i></p> <p>To support your application please provide details of what you wish the court to do and a short summary for why you want an order changed or removed. For example, you could be applying to change the duration of your order because you need more time.</p>
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¹ For the relevant form, please see page 4 of www.justice.govt.nz/assets/Documents/Forms/change-or-remove-a-hdc-order.pdf .

Table 1

			include more time is needed for the applicant to comply with the order.	
Australia	Section 44G of the <u>Enhancing Online Safety Act 2015</u>	• Civil fine	<ul style="list-style-type: none"> No express provision The personal receiving the removal notice should comply with the request under the removal notice to the extent that the person is capable of doing so. 	<i>"A person must comply with a requirement under a removal notice <u>to the extent that the person is capable of doing so.</u>"</i>
	Sections 67, 80, 91, 111 and 116 of the <u>Online Safety Bill 2021</u> ²	• Civil fine	<ul style="list-style-type: none"> No express provision The personal receiving the removal notice should comply with the request under the removal notice to the extent that the person is capable of doing so. 	<i>"A person must comply with a requirement under a removal notice [under the relevant sections] <u>to the extent that the person is capable of doing so.</u>"</i>
<u>(B) Hong Kong Legislation</u>				
Sections	Defence	Cross-referencing legislation		
s.66O 2(a)	the person had a <u>reasonable excuse</u> for contravening the cessation notice	<ul style="list-style-type: none"> Section 197 of Financial Institutions (Resolution) Ordinance (Cap. 628) – Reasonable excuse raised for the offences created under this Ordinance “(2) The reference to a reasonable excuse is to be construed as providing for a <u>defence</u> to a charge³ (For example, if a financial institution or holding company <u>fails</u>, without reasonable excuse, <u>to</u> 		

² Passed on 23 June 2021 and the Bill is proposed to be implemented in 6 months' time.

³ Including (i) section 16: a financial institution or holding company fails, without reasonable excuse, to comply with the written notice under section 14, commits an offence ; (ii) section 82: An affiliated operational entity, without reasonable excuse, fails to comply with a notice served on it under section 81(3) commits an offence.

Table 1

		<p><u>comply with</u> the <u>written notice</u> under section 14, commits an offence) in respect of the contravention to which the provision relates.”</p> <ul style="list-style-type: none"> Section 79C of Occupational Retirement Schemes Ordinance (Cap. 426) – Proof of reasonable excuse or lawful authority for the offences created under this Ordinance <i>“In proceedings for an offence (For example, a person, who without reasonable excuse, fails to give the Registrar information or a document required under a written notice) under this Ordinance, the defendant is to be taken to have established that the defendant had a <u>reasonable excuse</u> or lawful authority for the contravention⁴ in question if —</i> <ul style="list-style-type: none"> (a) sufficient evidence is adduced to raise an issue that the defendant had such a <u>reasonable excuse</u> or lawful authority; and (b) the contrary is not proved by the prosecution beyond reasonable doubt.”
s.66O 2(b)(i)	it was not reasonable to expect the person to comply with the cessation notice — having regard to the <u>nature, difficulty or complexity</u> of the cessation action concerned	<ul style="list-style-type: none"> Section 13 of Noise Control Ordinance (Cap. 400) – Noise abatement notices <i>“(2) A noise abatement notice served under subsection (1) relating to noise emanating from any place may require the person on whom it is served to abate the noise within the period specified therein and do all things as may be necessary for that purpose... (3) In specifying a period under subsection (2) within which noise is to be abated, the Authority shall have regard to the <u>nature, difficulty and complexity</u> of complying with any requirement in the noise abatement notice.”</i> Section 68D of Banking Ordinance (Cap. 155) – General power to impose requirements

⁴ Including (i) section 10: A person who, without reasonable excuse, fails to give the Registrar information or a document pursuant to a notice, commits an offence; (ii) section 20B: If, without reasonable excuse, a person other than an eligible person is allowed to be a member of a registered scheme, the relevant employer of the scheme commits an offence.

Table 1

		<p>“(1) The Monetary Authority may, by notice in writing served on an authorized institution, impose requirements on the institution in relation to its recovery plan.</p> <p>(4) In imposing the requirements, the Monetary Authority may have regard to the <u>nature, scale and complexity</u> of the authorized institution’s operations.”</p>
s.66O 2(b)(ii)	<p>it was not reasonable to expect the person to comply with the cessation notice —</p> <p>because the <u>technology necessary</u> for complying with the cessation notice <u>was not reasonably available</u> to the person</p>	<ul style="list-style-type: none"> <p>Section 5 of Fire Safety (Buildings) Ordinance (Cap. 572) – Owner or occupier may be directed to comply with fire safety measures</p> <p>“(8) An owner or occupier who, without reasonable excuse, fails to comply with a fire safety direction is guilty of an offence...</p> <p>(9) The reference in subsection (8) to <u>reasonable excuse includes, but is not limited to, the excuse that, at the time when the fire safety direction was not complied with, it was not reasonable to expect the owner or occupier to comply with the direction</u> —</p> <p>...</p> <p>(b) because the <u>technology required to comply with the direction is not reasonably available.</u>”</p> <p>Section 11 of Fire Safety (Industrial Buildings) Ordinance (Cap. 636) – Not complying with fire safety direction is offence</p> <p>“(1) An owner or occupier of a building or a part of a building who, without reasonable excuse, fails to comply with a fire safety direction for the building or part commits an offence.</p> <p>...</p> <p>(3) The reasonable excuse referred to in subsection (1) <u>includes, but is not limited to, it not being reasonable to expect</u> the owner or occupier to <u>comply</u> with the direction during the time for complying with it—</p> <p>(b) <u>because the technology required for compliance is not reasonably available.</u>”</p>

Table 1

s.66O 2(b)(iii)	it was not reasonable to expect the person to comply with the cessation notice — because there was a <u>risk of incurring substantial loss</u> to, or otherwise <u>substantially prejudicing the right, of a third party</u>	<ul style="list-style-type: none"> • Section 118E of Banking Ordinance (Cap. 155) – Procedure on and effect of revocation of approval “(2) Immediately upon the proposed revocation of the approval of an approved money broker taking effect in accordance with section 118D(2), that broker shall cease to act as a money broker. (3) Subsection (2) shall not operate to prejudice the enforcement or other maintenance by any person of <u>any right or interest against an approved money broker (or former approved money broker) referred to in that subsection, or by the broker of any right or interest against any person.</u>”
s.66O 2(b)(iv)	it was not reasonable to expect the person to comply with the cessation notice — because there was a <u>risk of incurring a civil liability arising in contract, tort, equity or otherwise</u>	<p>There is no equivalent “defence” crafted like section 66O(2)(b)(iv) under the legislations in Hong Kong. Instead, it is provided in the form of “immunity”. For example,</p> <ul style="list-style-type: none"> • Section 380 of Securities and Futures Ordinance (Cap. 571) – Immunity “(3) A person who complies with a requirement made under any provision of this Ordinance shall not incur <u>any civil liability</u>, whether arising in contract, tort, defamation, equity or otherwise, to any person by reason only of that compliance.” • Section 54 of Financial Reporting Council Ordinance (Cap. 588) – Immunity “(1) A person who complies with a specified requirement does not incur any civil liability, whether arising in contract, tort, defamation, equity or otherwise, by reason only of the compliance. (2) A person <u>does not incur any civil liability</u>, whether arising in contract, tort, defamation, equity or otherwise, in respect of anything done, or omitted to be done, by the person in good faith in the performance, or purported performance, of any function under this Ordinance.”

Disclosing Personal Data for the Purpose of News Activity

Local Case

	Case	Facts	Result
Hong Kong	The birth certificate of a child of a celebrity was published openly by the press. (KTS 566-569/2021)	The defendants i.e. the concerned press and Chief Editor, were accused of contravening s.64(1)(a) of the Personal Data (Privacy) Ordinance, i.e. disclosing personal data of a data subject which was obtained from a data user without the data user's consent, with an intent to obtain gain in money or other property, whether for the benefit of the person or another person; the concerned reporter was accused of aiding and abetting the disclosure of the concerned personal data, contravening s.64(1)(a) of the Personal Data (Privacy) Ordinance and s.89 of the Criminal Procedure Ordinance.	The case was trialed at the West Kowloon Magistrates' Courts in June 2021. The concerned press and Chief Editor pleaded guilty and were ordered to pay a fine of \$40,000 each. The concerned reporter reached a bind-over agreement for 12 months upon paying \$2,000 with the charge dropped.

Overseas Case

The House of Lords pointed out in *Campbell v MGN Ltd* [2004] UKHL 22 that public interest should have a valid legal basis. Later in *Jameel (Mohammed) and another v Wall Street Journal Europe Sprl (No.3)* [2007] 1 AC 359, the House of Lords ruled that incidents that are of interest to the public may not fit the threshold of real public interest.

Table 3

Doxxing Offence (Comparison Table on Legal Framework in other jurisdictions)

Content Country	Legislation	Penalties	Enforcement Authority
Singapore	<p>Section 3 of the <u>Protection from Harassment Act</u> provides that: Any person will commit an offence, if he publishes other's identity information:</p> <p>(a) with an intent to harass, alarm or distress the data subject or a related person of the data subject; and</p> <p>(b) causing the data subject or a related person of the data subject harassment, alarm or distress.</p> <p>[Note: Pursuant to section 8A(3), the scope of "harm" means (a) any physical harm; (b) harassment, alarm or distress; or (c) being caused to believe that unlawful violence will be used against the victim.]</p>	<p>Imprisonment for a term not exceeding 6 months and/ or to a fine not exceeding SGD5,000 (around HK\$28,700).</p> <p>The court may issue an enhanced punishment not exceeding twice the maximum penalty for repeated offences or offences against vulnerable persons.</p>	Protection from Harassment Court
New Zealand	Pursuant to section 22 of the <u>Harmful Digital Communications Act 2015</u> , a person commits an offence if:	<ul style="list-style-type: none"> Natural person: imprisonment of two years or a fine of NZD50,000 (around HK\$258,000) 	Section 7 of the Harmful Digital Communications Act 2015 provides that the Governor-General may appoint an Approved Agency to

Table 3

Content Country	Legislation	Penalties	Enforcement Authority
	(a) the person posts a digital communication with the intention of causing harm to a victim; (b) posting the communication would cause harm to an ordinary reasonable person in the position of the victim; and (c) posting the communication causes harm ¹ to the victim.	<ul style="list-style-type: none"> Body corporate: a fine of NZD200,000 (HK\$1,033,000) 	handle complaints in relation to harmful digital communications. Netsafe, an independent non-profit organization, was appointed with statutory powers to handle complaints.
Australia	<p><u>Enhancing Online Safety Act 2015</u></p> <p>administers a complaints system and an objection system for</p> <p>(i) Cyber-bullying material of an Australian Child)) (Section 18); and</p> <p>(ii) Non-consensual sharing of intimate images (Section 44B).</p> <p>The Australian government had conducted public consultation to expand the power under <i>Enhancing Online</i></p>	<p><u>Enhancing Online Safety Act 2015</u></p> <ul style="list-style-type: none"> No criminal sanction <p>(Note: Posting an intimate image without consent will be subject to civil penalty of AUD 110,000 (around HKD 660,000) (section 44B))</p> <p><u>Online Safety Bill 2021</u></p> <ul style="list-style-type: none"> No criminal sanction 	<p><u>Enhancing Online Safety Act 2015</u></p> <ul style="list-style-type: none"> Pursuant to section 14 of the Act, the eSafety Commissioner is empowered to execute the powers under the Act. <p><u>Online Safety Bill 2021</u></p> <ul style="list-style-type: none"> Pursuant to section 26 of the Bill, the eSafety Commissioner is

¹ According to section 4 of the **Harmful Digital Communications Act 2015**, “harm” means “serious emotional distress”.

Table 3

Content Country	Legislation	Penalties	Enforcement Authority
	<p><i>Safety Act 2015</i> from 2019 to February 2021. Online Safety Bill 2021 (passed on 23 June 2021 and proposed to be implemented in 6 months' time) was introduced. The key proposals of the Bill include: (i) tighten the timeframe for removal of illegal and harmful contents from 48 hours to 24 hours; (ii) put in place a new scheme targeted at removal of cyber-abuse materials targeted at an Australian adult.</p> <p><i>(Note: scope of the offence, penalties and the responsible enforcement authority remain intact. Please refer to the columns on the right.)</i></p>	<p>(Note: Posting an intimate images without consent will be subject to civil penalty of AUD 110,000 (around HKD 660,000) (section 75))</p>	<p>empowered to execute the powers under the Act.</p>

Table 4

Cessation Notice Regime (Comparison Table on Legal Framework in other jurisdictions

Content Country	Procedure	Target	Materials to be removed	Review/ Appeal mechanism	Consequences of non-compliance
Singapore	<p><u>Protection from Harassment Act</u></p> <p>The victim may apply to the Protection from Harassment Court for the following protection orders:</p> <p>(a) Stop Publication Order – require the respondent or any other individual or entity to stop publishing the relevant statement, and not to publish any substantially similar statement, by a specified time (section 15A);</p>	<ul style="list-style-type: none"> Any individual or entity (section 15A)¹ an internet intermediary)²(section 15C) 	<ul style="list-style-type: none"> Offending communications; False statement; Information regarding other persons' identities 	<p>Interested parties may apply to vary, suspend or cancel a Protection Order or expedited Protection Order (section 16C).</p> <p>Further appeals against civil and criminal decisions can be brought to the higher courts. However, expedited Protection Order cannot be appealed. (section 13(5))</p>	<p>Pursuant to section 16D, disobedience or breach of an order is a contempt of court.</p>

¹ When the Protection from Harassment Court is satisfied that an individual or entity has published a false statement and it is just and equitable to make the Stop Publication Order.

² According to section 2 of the **Protection from Harassment Act**, “intermediary service” means: (i) a service that allows end-users to access materials originating from third parties, using the internet; (ii) a service of transmitting materials to end-users on or through the internet; or (iii) a service of displaying, to an end-user who uses the service to make an online search, an index of search results, each of which links that end-user to content hosted or stored at a location which is separate from the location of the index of search results.

Table 4

Content Country	Procedure	Target	Materials to be removed	Review/ mechanism	Appeal	Consequences of non-compliance
	<p>(b) Disabling Order – require the internet intermediary to disable access by end-users to specific content (section 15C)</p> <p>Applications for expedited Protection Orders are heard within 24 to 72 hours, while applications for protection orders are processed within four weeks.</p>					
New Zealand	<p>There are two ways:</p> <p><u>(i) Issued by Netsafe (section 24)</u></p> <p>The online content host must no later than 48 hours after receiving a notice of complain, notify the</p>	Online Content Host	No specified categories of materials, but according to section 22(2), in determining whether a message could cause harm, the court may take into account any factors it considers relevant, including :	<p><u>(i) Civil remedy ordered by the Court</u></p> <p>Relevant person may apply to vary or discharge a court order by submitting an interlocutory application.</p>		<p><u>(i) Issued by Netsafe</u></p> <p>Netsafe is an independent non-profit organization without any enforcement power. Non-compliance of notice is not an offence.</p>

Table 4

Content Country	Procedure	Target	Materials to be removed	Review/ Appeal mechanism	Consequences of non-compliance
	<p>author of the specific content and request to take down the content.</p> <p>The author of the specific content may submit a counter-notice to refuse the removal. If the host is unable to contact the author, the host must take down or disable the specific content no later than 48 hours after receiving a notice of complaint.</p> <p><u>(ii) Civil remedy ordered by the Court</u></p> <p>The victim may apply to the Court for an order, including but not limited to take down or disable the material; requesting the defendant to cease</p>		<ul style="list-style-type: none"> • the extremity of the language used; • the age and characteristics of the victim; • whether the digital communication was anonymous or was repeated; • the extent of circulation of the digital communication; • whether the digital communication is true or false; and • the context in which the digital communication appeared. 	Appeals against civil cases can be brought to higher courts.	<p><u>(ii) Civil remedy ordered by the Court</u></p> <p>Natural person: imprisonment for a term not exceeding 6 months or a fine not exceeding NZD5,000 (around HK\$25,800).</p>

Table 4

Content Country	Procedure	Target	Materials to be removed	Review/ mechanism	Appeal	Consequences of non-compliance
	<p>or refrain from the conduct concerned; and/or a correction or an apology to be published.</p> <p>The Court may also make an order to the online content host to take down specific content and/ or release the identity of an anonymous communicator (section 19(3)).</p>					Body corporate: a fine not exceeding NZD20,000 (around HK\$103,300)
Australia	<p><u>Enhancing Online Safety Act 2015</u></p> <p>If the complaint is accepted by the eSafety Commissioner, the Commissioner may issue a removal notice to the relevant party (<i>Please refer to the column on the right</i>), to request the party to</p>	<p><u>Enhancing Online Safety Act 2015</u></p> <p><u>& Online Safety Bill 2021</u></p> <ul style="list-style-type: none">• social media service;• relevant electronic service;• designated internet service;• hosting service;• end-users of social media service.	<p><u>Enhancing Online Safety Act 2015</u></p> <ul style="list-style-type: none">• cyber-bullying material of an Australian Child (section 29)• non-consensual sharing of intimate images (sections 44D, 44E and 44F)	<p><u>Enhancing Online Safety Act 2015</u></p> <ul style="list-style-type: none">• Apply to the Administrative Appeals Tribunal to review the decision of eSafety Commissioner in issuing a removal notice	<p><u>Enhancing Online Safety Act 2015</u></p> <ul style="list-style-type: none">• cyber-bullying material of an Australian Child: If the eSafety Commissioner is satisfied that the provider of a social media service has not complied with a removal request	

Table 4

Content Country	Procedure	Target	Materials to be removed	Review/ mechanism	Appeal	Consequences of non-compliance
	take reasonable steps to remove harmful contents within 48 hours after the notice was served.			(section 88(8)). This appeal mechanism is not applicable to the removal request issued in relation to cyber-bullying material of an Australian child.		under section 29, the Commissioner may prepare a statement to that effect; and publish the statement on the Commissioner's website. (section 39) <ul style="list-style-type: none"> non-consensual sharing of intimate images: subject to civil penalty AUD 110,000 (around HKD 660,000) (section 44G)
	<u>Online Safety Bill 2021</u> ³ If the complaint is accepted by the eSafety Commissioner, the Commissioner may		<u>Online Safety Bill 2021</u> <ul style="list-style-type: none"> cyber-bullying material of an Australian Child (sections 65 -66) 	<u>Online Safety Bill 2021</u> <ul style="list-style-type: none"> Apply to the Administrative Appeals Tribunal to review the 		<u>Online Safety Bill 2021</u> <ul style="list-style-type: none"> AUD110,000 (around HKD 660,000) (sections 67, 80, 91& 116)

³ Passed on 23 June 2021 and proposed to be implemented in 6 months' time.

Table 4

Content Country	Procedure	Target	Materials to be removed	Review/ mechanism	Appeal	Consequences of non-compliance
	issue a removal notice to the relevant party (<i>Please refer to the column on the right</i>), to request the party to take reasonable steps to remove harmful contents within 24 hours after the notice was served. (sections 88 -90)		<ul style="list-style-type: none"> • Non-consensual sharing of intimate images (sections 77-79) • Cyber-abuse material targeted at an Australian adult (sections 88-90) • Class 1 Material ⁴ (sections 109-110) • Class 2 Material ⁵ (sections 114-115) 	decision of eSafety Commissioner in issuing a removal notice (sections 220(2), (6) & (11))		

⁴ According to the Australian National Classification Code (May 2005), any publication, films or computer games which describes, depicts or otherwise deals with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that it offends against the standards of morality, decency, and propriety generally accepted by reasonable adults to the extent that it should not be approved, will be categorized as “Refused Classification”, i.e. Class 1 Material.

⁵ According to the Australian National Classification Code (May 2005), any publication, films or computer games which depicts sexual explicit contents but do not involve violence content, and are not suitable for children, will be categorized as “X18+”, i.e. Class 2 Material.