



Industry Submission - Proposed Language Changes to Hong Kong Personal Data (Privacy) (Amendment) Bill 2021 *[this submission should be read in conjunction with the [letter dated 12 August 2021](#)]*

18 August 2021

To
The Bills Committee
Personal Data (Privacy) (Amendment) Bill 2021
Legislative Council Secretariat
Legislative Council Complex, 1 Legislative Council Road
Central, Hong Kong

Subject: Industry Submission - Proposed Language Changes to Hong Kong Personal Data (Privacy) (Amendment) Bill 2021 *[this submission should be read in conjunction with the [letter dated 12 August 2021](#)]*

On behalf of the Asia Internet Coalition (AIC) and its members, I am writing to express our sincere gratitude to the Constitutional and Mainland Affairs Bureau (**the Bureau**), **the Bills Committee**, and the **Office of the Privacy Commissioner for Personal Data (PCPD)** to submit further comments on the [Personal Data \(Privacy\) \(Amendment\) Bill 2021](#).

The AIC wishes to reiterate that doxxing is a matter of serious concern, a view that AIC shares with Hong Kong. We also appreciate the importance of privacy and the protection of personal information and are therefore committed to the principles that safeguard users' personal identities. To this extent, the AIC and its members are strongly committed to continue working together with the PCPD to develop effective policies to support Hong Kong's continued digital growth and transformation. **As such, in addition to our [submission dated on 12 August 2021](#), please find appended to this letter the [Proposed Language Changes to Hong Kong Personal Data \(Privacy\) \(Amendment\) Bill 2021](#), which we would like to respectfully request the PCPD and the Bills Committee to consider.**

Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact our Secretariat Mr. Sarthak Luthra at Secretariat@aicasia.org. Furthermore, we are happy to meet with the PCPD again to further discuss our comments and recommendations in order to shape the dialogue for the advancement of data protection in Hong Kong.

Once again, thank you very much for this opportunity.

Sincerely,

A handwritten signature in blue ink, appearing to read "Paine".

Jeff Paine
Managing Director
Asia Internet Coalition (AIC)

Proposed Language Changes to Hong Kong Personal Data (Privacy) (Amendment) Bill 2021

Unless otherwise specified, the proposed draft language changes are pursuant to the industry comments.

Legend:

- ~~Suggest deletion~~
- Suggested addition

No.	Proposed language changes	Brief explanation for proposed language changes & reference to industry comments (if applicable)
Scope of the Doxxing Offence		
1	<p>3. Section 2 amended (interpretation)</p> <p>...</p> <p>(2) Section 2(1)—</p> <p>Add in alphabetical order</p> <p>“family member (家人), in relation to a person, means another person who is related to the person by blood, marriage, adoption or affinity, filiation or adoption.”.</p>	<p>The scope of family members related by “blood” or “affinity” is too vague and broad under the proposed first-tier offence under section 64(3A) where no actual specified harm is caused to the family member.</p>
2	<p>6. Section 64 amended (offences for disclosing personal data obtained without consent from data users)</p> <p>...</p> <p>(4) After section 64(3)—</p> <p>Add</p> <p>“(3A) A person commits an offence if the person discloses any personal data of a data subject without the relevant consent of the data subject —</p> <p>(a) with an intent to cause any specified harm to the data subject or any family member of the data subject; or</p>	<p>The omission of any requirement for actual harm to be proved not only departs from the intention in the Discussion Paper of the Legislative Council Panel on Constitutional Affairs dated 17 May 2021, but also introduces significant risks of excessive and/or overbroad application of the offence and creates an opaque operating environment for platform service providers and citizens alike. Instead there should be a reasonable test for a harm to be proved.</p> <p>It would be draconian to have people convicted, fined and imprisoned for a data offence where no actual harm has occurred.</p> <p>We would also like to seek clarification if “discloses” may cover disclosure to public or in private communications. It is not clear if the law is applicable only to public user generated</p>

No.	Proposed language changes	Brief explanation for proposed language changes & reference to industry comments (if applicable)
	<p>(b) being reckless as to whether any specified harm would be, or would likely be, caused to the data subject or any family member of the data subject.</p> <p>(a) the person discloses any personal data of a data subject without the relevant consent of the data subject with an intent to cause any specified harm to the data subject or any family member of the data subject; and</p> <p>(b) the disclosure causes any specified harm to the data subject or any family member of the data subject.</p> <p>(3B) A person who commits an offence under subsection (3A) is liable on conviction to a fine at level 6 and to imprisonment for 2 years.</p> <p>(3C) A person commits an offence if—</p> <p>(a) the person discloses any personal data of a data subject without the relevant consent of the data subject</p> <p>(i) with an intent to cause any specified harm to the data subject or any family member of the data subject; or</p> <p>(ii) being reckless as to whether any specified harm would be, or would likely be, caused to the data subject or any family member of the data subject; and</p> <p>(b) the disclosure causes any specified harm to the data subject or any family member of the data subject.</p> <p>(3D) A person who commits an offence under subsection (3C) is liable on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 5 years.”.</p> <p>(3B) A person who commits an offence under subsection (3A) is liable on conviction on indictment to a fine of</p>	<p>content, or whether it might also apply to private communication.</p>

No.	Proposed language changes	Brief explanation for proposed language changes & reference to industry comments (if applicable)
	<p>\$1,000,000 to a fine at level 6 and to imprisonment for 5 2 years.</p>	
3	<p>6. Section 64 amended (offences for disclosing personal data obtained without consent from data users)</p> <p>...</p> <p>(7) After section 64(4)(d)—</p> <p>Add</p> <p>“(e) without limiting paragraph (d), the person had reasonable grounds to believe that the disclosure was in the public interest, or the interest of the data subject or any family member of the data subject; or</p> <p>(f) the disclosure was otherwise reasonable.”</p>	<p>A “sole purpose” criterion will disproportionately restrict the scope of the relevant defence.</p> <p>The pre-existing “public interest” defence in section 64(d) linked to “lawful news activity” may not cover situations where there is reasonable ground to believe that the disclosure was for public interest or the interest of the data subject and/or any family member of the data subject outside the scope of news activity.</p> <p>See, e.g. section 3(3) of Singapore’s Protection from Harassment Act 2014, which provides that, in relation to the offence of intentionally causing harassment, alarm or distress, it is a defence to prove that the conduct was “reasonable”.</p>
4	<p>6. Section 64 amended (offences for disclosing personal data obtained without consent from data users)</p> <p>...</p> <p>(8) After section 64(4)—</p> <p>Add</p> <p>“(5) ...</p> <p>(6) In this section— ...</p> <p>specified harm (指明傷害), in relation to a person, means—</p> <p>(a) harassment, molestation, pestering, threat or intimidation to the person;</p> <p>(a) threat of harm or damage under paragraphs (b), (c) and (d), or intimidation under section 24 of the</p>	<p>Acts which are not themselves criminal in nature, i.e. harassment, molestation, pestering or intimidation (as opposed to criminal intimidation) should be removed. The scope of “threat” should also be narrowed to threats to cause bodily harm (including death) or damage to property, but not generally any threat.</p>

No.	Proposed language changes	Brief explanation for proposed language changes & reference to industry comments (if applicable)
	<p>Crimes Ordinance (Cap. 200) to the person;</p> <p>(b) bodily harm or psychological harm to the person <i>constituting an offence against the person under the laws of Hong Kong</i>;</p> <p>(c) harm causing the person reasonably to be concerned for the person's safety or well-being; or</p> <p>(c) harm causing a reasonable person in that person's situation to reasonably believe that an offence against the person under the laws of Hong Kong may be committed against him; or</p> <p>(d) damage to the property of the person <i>constituting an offence against property under the laws of Hong Kong</i>.”.</p>	
Intermediary Liability		
5	<p>66M. Service of cessation notice</p> <p>...</p> <p>(2) In addition, if the Commissioner has reasonable ground to believe that—</p> <p>(a) there is a subject message that is an electronic message; and</p> <p>(b) a non-Hong Kong service provider is able to take a cessation action (whether or not in Hong Kong) in relation to the message,</p> <p>the Commissioner may serve a written notice on the <i>non-Hong Kong provider</i> provider directing the provider to take the cessation action.</p>	<p>We propose to clarify the drafting language that the notices will be served on non-Hong Kong service operators and not their local affiliates, as not all international intermediaries operate their services from within Hong Kong, and local representatives or sales offices located in Hong Kong are not the appropriate recipients for cessation notices proposed.</p>
6	<p>66K. Meaning of <i>subject disclosure</i></p> <p>(1) For the purposes of this Division, a disclosure (whether or not in Hong</p>	<p>While not expressly set out in the industry comments, we propose to remove the “recklessness” limb from the definition of “subject disclosure”, consistent with the</p>

No.	Proposed language changes	Brief explanation for proposed language changes & reference to industry comments (if applicable)
	<p>Kong) of personal data of a data subject by a person is a subject disclosure if—</p> <p>...</p> <p>(b) the person discloses the personal data without the relevant consent of the data subject—</p> <p>(i) with an intent to cause any specified harm to the data subject or any family member of the data subject; or</p> <p>(ii) being reckless as to whether any specified harm would be, or would likely be, caused to the data subject or any family member of the data subject.</p> <p>(b) the person discloses the personal data without the relevant consent of the data subject with an intent to cause any specified harm to the data subject or any family member of the data subject</p>	<p>proposal to remove “recklessness” in the offence under the proposed section 64(3C).</p>
7	<p>66N. Appeal against cessation notice</p> <p>(1) Within 14 days after the date on which a cessation notice is served on a person, an appeal may be made to the Administrative Appeals Board against the notice by—</p> <p>(a) that person; or</p> <p>(b) any other person who is affected by the notice.</p> <p>(2) The appeal does not affect the operation of the cessation notice.</p> <p>(2) A cessation notice that is appealed against shall be suspended in its operation as from the day on which notice of the appeal is made under subsection (1) until such appeal is disposed of, withdrawn or abandoned.</p> <p><i>[Note: We have proposed 9 months as a “reasonably prompt deadline” based on procedures involved and</i></p>	<p>The proposed requirement for compliance with a cessation notice pending the outcome of the appeal is disproportionate and unnecessary. Instead, a reasonably prompt deadline should be specified for the Administrative Appeals Board to provide an appeal decision in order to balance the interests between the victims of doxxing activities and the public’s rights to access information.</p>

No.	Proposed language changes	Brief explanation for proposed language changes & reference to industry comments (if applicable)
	<i>precedents – please amend as appropriate.]</i>	
PCPD's Enforcement Power		
9	<p>66D. Commissioner's powers to require materials and assistance</p> <p>(1) This section applies if the Commissioner reasonably suspects that, in relation to a specified investigation, a person <i>who is reasonably suspected of having committed an offence under section 64(1), (3A) or (3C), 66E(1) or (5), 66I(1) or 66O(1)—</i></p> <p>(a) has or may have possession or control of any material relevant to that investigation; or</p> <p>(b) may otherwise be able to assist the Commissioner in relation to that investigation.</p>	<p>The definition of “person” should be limited to the individual posting the information.</p> <p><i>[Note: Our proposed revision, in addition to the doxxing offences, would also cover the pre-existing offence under section 64(1) and the new offences for failure to comply with the Privacy Commissioner's investigation/enforcement powers and cessation notices]</i></p>
10	<p>66D. Commissioner's powers to require materials and assistance</p> <p>...</p> <p>(2) The Commissioner may, by written notice given to the person, require the person—</p> <p>(a) to provide the Commissioner with any material in the person's possession or control relating to a matter that the Commissioner reasonably believes to be relevant to the specified investigation;</p> <p>(b) to attend before the Commissioner at a specified time and place, and answer any question relating to a matter that the Commissioner reasonably believes to be relevant to the specified investigation; or</p> <p>(c) to answer any written question relating to a matter that the Commissioner reasonably believes to</p>	<p>We consider that the powers in the proposed section 66D(2)(d) and (e) are overly broad and disproportionate in the context of data protection.</p>

No.	Proposed language changes	Brief explanation for proposed language changes & reference to industry comments (if applicable)
	<p>be relevant to the specified investigation.</p> <p>(d) to make a statement relating to a matter that the Commissioner reasonably believes to be relevant to the specified investigation; or</p> <p>(e) to give the Commissioner all the assistance that the Commissioner reasonably requires for the specified investigation.</p>	
11	<p>66E. Offences in relation to section 66D</p> <p>...</p> <p>(3) It is a defence for a person charged with an offence under subsection (1) to establish that—</p> <p>(a) the person had a reasonable excuse for failing to comply with the requirement; or</p> <p>(b) without limiting paragraph (a), it was not reasonable to expect the person to comply with the requirement—</p> <p style="padding-left: 40px;">(i) having regard to the nature, difficulty or complexity of the requirement concerned;</p> <p style="padding-left: 40px;">(ii) because there was a risk of incurring substantial loss to, or otherwise substantially prejudicing the right of, a third party;</p> <p style="padding-left: 40px;">(iii) because there was a risk of incurring a civil liability arising in contract, tort, equity or otherwise; or</p> <p style="padding-left: 40px;">(iv) because the material, explanation, particulars, answer or statement required in the</p>	<p>While not expressly set out in the industry comments, we propose to follow the approach taken in section 66O(2)(b) to specify certain defences.</p> <p><i>[Note: sub-paragraphs 3(b)(i) to (iii) are adapted from the proposed section 66O (2)(b) with regard to cessation notice (with the defence “because the technology necessary for complying ... was not reasonably available to the person” omitted as we do not consider it applicable), whereas sub-paragraph 3(b)(iv) is adapted from section 183(3) of the Securities and Futures Ordinance (Cap. 571)].</i></p>

No.	Proposed language changes	Brief explanation for proposed language changes & reference to industry comments (if applicable)
	<p style="color: blue;">requirement was not within the person's knowledge or in his possession or control.</p> <p>(4) A person is taken to have established that the person had a reasonable excuse referred to in subsection (3) if—</p> <p>(a) there is sufficient evidence to raise an issue that the person had such a reasonable excuse; and</p> <p>(b) the contrary is not proved by the prosecution beyond reasonable doubt.</p>	
12	<p>66G. Powers exercisable in relation to premises and electronic devices</p> <p>...</p> <p>(6) When powers are exercised under the warrant, a specified person must, without charge, reasonably suspected of contravening an offence under section 64(1), (3A) or (3C), 66E(1) or (5), 66I(1) or 66O(1) must, without charge, afford facilities and assistance reasonably required by the Commissioner or any prescribed officer for the purposes of the specified investigation.</p> <p>...</p> <p>(8) Subsections (1) and (7) do not affect any power that may be exercised under the common law in relation to an electronic device by a person who has made an arrest (whether or not under section 66H).</p> <p>(8) If the Commissioner or any prescribed officer—</p> <p>(a) reasonably suspects that an offence under section 64(1), (3A) or (3C), 66E(1) or (5), 66I(1) or 66O(1) has been, is being or is about to be committed;</p>	<p>Section 66G(6) as proposed would include intermediaries, their local subsidiaries and personnel and is a disproportionate measure for intermediaries who are not the primary author of doxxing. We reiterate that intermediaries, their local subsidiaries and staff be excluded from the scope of this section.</p> <p>Section 66G(8) allows an authorized officer to have the broad power to access electronic devices <u>without warrant</u> akin to that of a police officer. We consider that the broad scope of the proposed power is not justified in the context of data protection laws and may cause disproportionate impact on individuals and corporations.</p> <p>After removal of section 66G(8), we note the Police still has the common law power of search incidental to the power of arrest to access electronic devices, exercisable without warrant in certain circumstances.</p> <p>In the alternative, if the Bills Committee is not amenable to removing Section 66(G)(8), we propose imposing a requirement that prior to accessing an electronic device without a warrant, a prescribed officer must obtain the Commissioner's sign-off authorising such access to the electronic device without a warrant. The objective is to</p>

No.	Proposed language changes	Brief explanation for proposed language changes & reference to industry comments (if applicable)
	<p>(b) reasonably suspects that any material that is or contains evidence for the purposes of a specified investigation is stored in an electronic device; and</p> <p>(c) is satisfied that a delay caused by an application for a warrant under subsection (1) is likely to defeat the purpose of accessing the device, or for any reason it is not reasonably practicable to make the application, the Commissioner or any prescribed officer may, without warrant, access the device.</p>	<p>reduce the chances of abuse of the broad powers under Section 66G(8) by prescribed officers.</p>
13	<p>66H. Powers to stop, search and arrest persons</p> <p>(1) An authorized officer may, without <ins>with</ins> warrant, stop, search and arrest any person whom the officer reasonably suspects of having committed an offence under section 64(1), (3A) or (3C), 66E(1) or (5), 66I(1) or 66O(1).</p> <p>...</p> <p>(3) If an authorized officer has arrested a person (arrested person) under subsection (1), the officer may search for and take possession of any thing that—</p> <p>(a) may be found on the arrested person or in or about the place at which the person has been arrested; and</p> <p>(b) the officer reasonably suspects—</p> <p style="padding-left: 40px;">(i) is related to the offence for which the person has been arrested; or</p> <p style="padding-left: 40px;">(ii) may throw light on the character or activities of the person.</p>	<p>Section 66H allows an authorized officer to have the broad power to stop, search and arrest <u>without warrant</u> akin to that of a police officer. We consider that the broad scope of the proposed power is not justified in the context of data protection laws and may cause disproportionate impact on individuals and corporations. In particular, the necessity and relevance of empowering an authorized officer to search and take possession of anything from an arrested person which the officer reasonably suspects “may throw light on the character or activities of the person” in the context of a doxxing offence are unclear.</p>

No.	Proposed language changes	Brief explanation for proposed language changes & reference to industry comments (if applicable)
Secrecy		
14	<p>66Q. Commissioner and others to maintain secrecy</p> <p>(1) Subject to subsections (2) and (3), the following person (person concerned) must maintain secrecy in respect of any matter that comes to the person's actual knowledge in performing the functions or exercising the powers under this Part—</p> <p>(a) the Commissioner;</p> <p>(b) a prescribed officer;</p> <p>(c) a person authorized by the Commissioner for the purposes of section 66H; or</p> <p>(d) a person assisting the Commissioner or a prescribed officer.</p> <p>(2) Subsection (1) does not operate to prevent the person concerned from—</p> <p>(a) subject to subsection (3), disclosing any matter to any person (including the Secretary for Justice and the Commissioner of Police) if the disclosure is necessary for the proper performance of the Commissioner's functions or the proper exercise of the Commissioner's powers under this Ordinance;</p> <p>(b) disclosing in the course of proceedings—</p> <p style="padding-left: 40px;">(i) for an offence under this Ordinance; and</p> <p style="padding-left: 40px;">(ii) before any court or magistrate, any matter relevant to those proceedings;</p> <p>(c) reporting evidence of any crime to such authority as the person concerned considers appropriate;</p> <p>(d) if the person concerned is one mentioned in subsection (1)(a), (b) or (c)—disclosing any matter referred to in subsection (1) that, in the opinion of the</p>	<p>We consider that section 66Q as currently drafted should only be interpreted to cover persons from the law enforcement side.</p> <p>If, however, this section does intend to cover those arrested, being investigated or required to provide assistance, we propose adding an exception for disclosure to obtain legal advice, which is not currently built in. While not expressly set out in the industry comments, we also propose adding the common exceptions for information which has already been made publicly available or disclosed in accordance with a court order or law.</p>

No.	Proposed language changes	Brief explanation for proposed language changes & reference to industry comments (if applicable)
	<p>person concerned, may be a ground for a complaint by a person (<i>prospective complainant</i>) to the prospective complainant;</p> <p>(e) the disclosure of information for the purpose of seeking advice from, or giving advice by, counsel or a solicitor or other professional adviser acting or proposing to act in a professional capacity in connection with any matter arising under any of the relevant provisions;</p> <p>(f) the disclosure of information which has already been in the public domain; or</p> <p>(g) the disclosure of information in accordance with an order of a court, or in accordance with a law or a requirement made under a law.</p> <p><i>[Note: the proposed additions are adapted from section 378(2) of the Securities and Futures Ordinance (Cap. 571)]</i></p>	