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1 Legislative Council Road
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(Attn: Ms Angel Wong)

24 August 2021

Dear Ms Wong,

Personal Data (Privacy) (Amendment) Bill 2021
Follow-up to the meeting on 13 August 2021

Thank you for your letter dated 16 August 2021 on the captioned matter. Having consulted the Department of Justice (“DoJ”) and the Office of the Privacy Commissioner for Personal Data (“PCPD”), our reply is as follows:

Revising the definition of “family member” to cover cohabitation relationship

“Family member” is defined in the Personal Data (Privacy) (Amendment) Bill 2021 (“the Bill”) as “in relation to a person, means another person who is related to the person by blood, marriage, adoption or affinity”. Currently, under section 63C of the Personal Data (Privacy) Ordinance (Cap. 486) (“PDPO”), informing an individual’s immediate family members of the individual’s involvement in emergency situations is exempted from the relevant

data protection principles. The definition of “family member” in the above provision is the same as that in the Bill.

On the proposed revision to the scope of “family member” to cover cohabitation relationship, currently, the definition of “family member” in certain other legislation, such as the Electronic Health Record Sharing System Ordinance (Cap.625), is defined as “an individual who is related to the recipient by blood, marriage, adoption or affinity”, which is the same as that in the PDPO. Also, we would like to point out that according to section 3B(2) of the Domestic and Cohabitation Relationships Violence Ordinance (Cap.189), the Court shall have regard to a number of factors in determining whether the concerned persons are in a cohabitation relationship¹. If the Bill covers cohabitation relationships, it may be difficult to prove the cohabitation relationship with concrete evidence during enforcement, reducing the efficiency of investigation or enforcement. In fact, if the offender of “doxxing” acts has an intent to cause harm to the cohabitant of an individual or is being reckless as to whether harm is caused to the cohabitant when disclosing his/her personal data, the cohabitant could be directly protected as a data subject under the Bill, and the DoJ or the PCPD may follow-up and consider to initiate prosecution in accordance with the proposed section 64 of the Bill.

¹ Section 3B(2) of the Domestic and Cohabitation Relationships Violence Ordinance (Cap.189), stipulates that in determining whether 2 persons (the parties) are in a cohabitation relationship, the court shall have regard to all the circumstances of the relationship including but not limited to any of the following factors that may be relevant in the particular case—

- (a) whether the parties are living together in the same household;
- (b) whether the parties share the tasks and duties of their daily lives;
- (c) whether there is stability and permanence in the relationship;
- (d) the arrangement of sharing of expenses or financial support, and the degree of financial dependence or interdependence, between the parties;
- (e) whether there is a sexual relationship between the parties;
- (f) whether the parties share the care and support of a specified minor;
- (g) the parties' reasons for living together, and the degree of mutual commitment to a shared life;
- (h) whether the parties conduct themselves towards friends, relatives or other persons as parties to a cohabitation relationship, and whether the parties are so treated by their friends and relatives or other persons.

Empowering Police officers to exercise powers relating to the specified investigations under the proposed section 66D

The PCPD has been actively discussing with the Police regarding the division of labour between the two parties, and will act upon the Member's suggestion by setting up a coordination and cooperation mechanism with the Police upon enactment of the Bill. Depending on the actual circumstances of a case, the PCPD may conduct joint operation with the Police.

Powers granted to the Privacy Commissioner under section 66D of the Bill are basically the same as the criminal investigation powers of the Police. Therefore, we consider that there is no need to further amend section 66D.

Definition of "specified harm" in the proposed section 64(6) - Cases related to "harassment", "molestation", "threat" or "intimidation"

The definition of "specified harm" in the Bill is broadly consistent with the wordings used in the injunction orders obtained by the Secretary for Justice from the High Court to restrain "doxxing" acts, including elements such as "harassment", "molestation", "pestering", "threat" or "intimidation".

With respect to the meaning of "harassment", "molestation" and "pestering", we are unable to find cases which are directly analogous with the proposed offences. Notwithstanding this, in *HKSAR v Leung Kwok Hung & Another* (HCMA 652/2016), the charges involve two appellants and other unknown persons who wilfully obstructed, disturbed, interrupted or annoyed other persons who were in the lawful use of the civic centre or the facilities provided therein. In that judgement, the Court pointed out that the four words, namely, *obstruct, disturb, interrupt and annoy*, were not defined in the relevant ordinance and regulation. Whether the acts concerned amounted to

obstruction, disturbance, interruption and annoyance to the rights of other persons who were in the lawful use of the civic centre was a question of fact and degree to be answered by a tribunal of fact by adopting common sense and the daily and ordinary meanings of the above words and their uses in the overall context when the acts were conducted. Whether the acts constituted wilful *obstruction, disturbance, interruption and annoyance* to “other persons who were in the lawful use of the civic centre” was a finding of fact to be determined by the Court.

As for cases related to “threat”, in *Chan Chi Kwong v R* (CACC 1144/1977), it was held that the person making the “threat” must do so with the intention that it shall be taken seriously, instead of an empty threat. In *HKSAR v Chan Tak-kuen* [2001] 1 HKLRD A10, it was held that the prosecution must prove that the person making the threat had intended to cause alarm to the victim, or the threat itself was of such a kind that a person of ordinary firmness would be affected by it. If the appellant’s words were just wild and whirling words, uttered in exasperation, then those words might not constitute an “intent to cause alarm”. In *HKSAR v Yau Yu Ming* [1999] HKLRD (Yrbk) 218, the Court cited that the “threat” must be made with a genuine intention to cause fear, or, in the circumstances, would be likely to produce that effect.

As for cases related to “intimidation”, in *Lo Tong-kai v R* [1977] *HKLR* 193, it was held that whether a “threat” amounted to criminal “intimidation” or not did not depend on the nerves of the victim being threatened; instead, the Court has to decide if it was such a threat that may overcome the ordinary free will of a firm man. It is not crucial as to whether the victim was actually intimidated.

Examples of “evidential burden” defence provisions in Hong Kong legislation

The relevant information is set out at **Annex** for Members’ reference.

Proposed sections 64(3A) and (3C) - Cases related to “recklessness”

Whether an act of “recklessness” constitutes *mens rea* should be determined by the subjective test adopted in *R v G* [2004] 1 AC 1034 and *Sin Kam-wah v HKSAR* [2005] 8 HKCFAR 192. If the defendant is aware of a risk which exists or would exist, or in respect of a result if he is aware of a risk that it would occur, and it is, in the circumstances known to him, unreasonable to take the risk, he would be regarded as “reckless” under such circumstances. On the contrary, the defendant would not be found guilty if he genuinely did not appreciate or foresee the risks involved in his actions due to his age or personal characteristics.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Jacky Lum', written over a horizontal line.

(Jacky LUM)

for Secretary for Constitutional
and Mainland Affairs

Examples of “evidential burden” defence provisions in Hong Kong Legislation

Legislation	Cross-referencing provisions
<p>Prohibition on Face Covering Regulation (Cap. 241K) section 4 - Defence for offence under section 3(2)</p>	<p>(1) It is a defence for a person charged with an offence under section 3(2) to establish that, at the time of the alleged offence, the person had lawful authority or <u>reasonable excuse</u> for using a facial covering.</p> <p>(2) A person is taken to have established that the person had lawful authority or reasonable excuse for using a facial covering if—</p> <p>(a) there is sufficient evidence to raise an issue that the person had such lawful authority or reasonable excuse; and</p> <p>(b) the contrary is not proved by the prosecution beyond reasonable doubt.</p>
<p>Chinese Medicine Ordinance (Cap. 549) section 138L -Defence raised for the offence under section 138K under this Ordinance</p>	<p>(1) It is a defence for a person charged under section 138K to establish that the person <u>had a reasonable excuse</u> for the failure or refusal.</p> <p>(2) The person is to be taken to have established that the person <u>had a reasonable excuse</u> for the failure or refusal if—</p> <p>(a) sufficient evidence is adduced to raise an issue that the person had such a <u>reasonable excuse</u>; and</p> <p>(b) the contrary is not proved by the prosecution beyond reasonable doubt.</p>

<p>Prevention and Control of Disease (Requirements and Directions) (Business and Premises) Regulation (Cap. 599F) section 13A - Defence</p>	<p>(1) It is a defence for a person charged with an offence under section 3(6), 7(2), 7AA(2), 9(2) or 9AA(2) to establish that, at the time of the alleged offence, the person had lawful authority or reasonable excuse for contravening the provision concerned.</p> <p>.....</p> <p>(3) A person is taken to have established a matter that needs to be established for a defence under this section if—</p> <p>(a) at here is sufficient evidence to raise an issue with respect to that matter; and</p> <p>(b) the contrary is not proved by the prosecution beyond reasonable doubt.</p>
<p>Limited Partnership Fund Ordinance (Cap. 637) section 89 - Defence</p>	<p>(1) In the legal proceedings against a person for a specified offence, it is a defence to establish that the person took all reasonable steps to avoid committing the offence.</p> <p>(2) The person is taken to have established that the person took all reasonable steps to avoid committing the specified offence if—</p> <p>(a) there is sufficient evidence to raise an issue that the person took all reasonable steps to avoid committing the offence; and</p> <p>(b) the contrary is not proved by the prosecution beyond reasonable doubt.</p>