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IMPORTANT

18 August 2021

Constitutional and Mainland Affairs Bureau
13th Floor
East Wing, Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

BY EMAIL AND BY POST
(cmabenq@cmab.gov.hk)

Attn: Mr. Jacky Lum, Principal Assistant Secretary

Dear Sir,

Proposed Doxxing Offence –
Personal Data (Privacy) (Amendment) Bill 2021

We wrote to you on 16 June 2021 on the proposed legislation on doxxing (enclosed) and have set out our preliminary queries thereon. While we are waiting for your substantive reply, we note the Personal Data (Privacy) (Amendment) Bill 2021 (the "Amendment Bill") was gazetted on 16 July 2021.

2. We repeat all our observations canvassed in our earlier letter, as being applicable *mutatis mutandis* to the Amendment Bill.

3. In respect of the Amendment Bill, we set out our comments in the following.

4. We fully agree that, as a crime, doxxing (with an intent to cause harm) must be stopped. It is intrusive to personal data privacy and can cause serious harm to the victims. We also agree that the present provisions of the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO") are not able to robustly deal with the crime of doxxing, and that relevant amendments are required. Yet, with respect to the Amendment Bill, there are serious issues that need to be carefully considered.

Right to Remain Silent

5. The most serious concern we have with the Amendment Bill is that, apparently, it takes away the right of an accused to remain silent.

6. The right to remain silent in the face of a criminal allegation is fundamental. It is constitutionally protected[i].

7. We acknowledge that in the criminal statutes in HKSAR, there are rare exceptions to the above, where one is compelled to answer questions from investigation authorities. However, this is extremely exceptional and also in those rarest occasions, the answers provided are not admissible in criminal proceedings against that person who gave the answers. These rare examples could be found in the Securities and Futures Ordinance (Cap. 571) and the Prevention of Bribery Ordinance (Cap. 201)[ii] (see also the Court of Final Appeal judgment in *A and Commissioner of Independent Commission Against Corruption (2012)* 15 HKCFAR 362 for the Court's clear view in this regard).

8. Before the Amendment Bill was gazetted, when we wrote to you on 16 June 2021, we highlighted to you our concern on the apparent removal of protection against self-incrimination (see paragraph 10 of our said letter, encl). While the Amendment Bill has not addressed this matter, we note with concern that it further confuses the position.

9. The Amendment Bill provides the Commissioner with power to require production, attendance, answers and assistance:

"66D. Commissioner's powers to require materials and assistance

(1) This section applies if the Commissioner reasonably suspects that, in relation to a specified investigation, a person –

(a) has or may have possession or control of any material relevant to that investigation; or

(b) may otherwise be able to assist the Commissioner in relation to that investigation.

(2) The Commissioner may, by written notice given to the person, require the person –

(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;

(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;

(c) to answer any written question relating to a matter that the Commissioner reasonably believes to be relevant to the specified investigation;

(d) to make a statement relating to a matter that the Commissioner reasonably believes to be relevant to the specified investigation; or

(e) to give the Commissioner all the assistance that the Commissioner reasonably requires for the specified investigation."

10. If the person upon a Section 66D request does not cooperate with the Commissioner, he could be guilty of an offence under the new **Section 66E**:

"66E. Offences in relation to section 66D

(1) A person commits an offence if the person fails to comply with a requirement of a notice given to the person under section 66D(2)..."

11. The above prima facie removes one's right to remain silent. It forces upon the accused to be "cooperative".

12. The safeguards (if any) against the use of self-incriminating materials are not apparent or clear in the Amendment Bill. In effect, our reading of the Amendment Bill is that when the Commissioner obtains these materials, answers, statements and materials from the accused, the Commissioner could use some, if not all those against the accused, notwithstanding what apparently are being proposed in the other parts of the Amendment Bill.

13. In the above regard, we refer you to **Section 66F** which provides the following

> *"66F. Use of incriminating evidence in proceedings*
>
> *(1) Subsection (2) applies if –*
>
> *(a) the Commissioner imposes a requirement on a person to give an answer to a question, to give directions, explanation or particulars, or to make a statement, under section 66D(2);*
>
> *(b) the answer, directions, explanation, particulars or statement (**required matter**) might tend to incriminate the person; and*
>
> *(c) the person claims, before giving or making the required matter, that it might so tend.*
>
> *(2) The requirement, question and required matter are not admissible in evidence against the person in criminal proceedings other than those in which the person is charged in respect of the required matter with –*
>
> *(a) an offence under section 66E(5); or*
>
> *(b) an offence under Part V of the Crimes Ordinance (Cap. 200).*
>
> *(3) Subsection (2) does not apply if, in the criminal proceedings, evidence relating to the required matter is adduced, or a question relating to it is asked, by the person who gives or makes the required matter or on that person's behalf.*

14. Two problems stem from the above provisions.

15. The first problem is the new Section **66F(2).** We surmise that that is put in, to try to protect the accused from use of self-incrimination materials he has given under Section 66D(2). However, what is being protected is not what the accused has given. Under Section 66D(2), a person could be asked to provide **materials,** to **meet**, to **answer** questions, to make a **statement** and to offer **assistance** (see paragraph 9 above). Under Section 66F(2) however it is the "*requirement, question and required matter* (defined to mean *the answer, directions, explanation, particulars or statement)* that are protected. These are not the same as those provided under Section 66D(2). Strictly speaking, therefore, not all that is given to the Commissioner under Section 66D(2) would receive protection under Section 66F(2). This could be either because the draftsman has forgotten to check that the language of Section 66D(2) mirrors that in Section 66F(2), or the different use of languages is deliberate

in order that not all the self-incriminating materials would be protected. If it is the latter case, then the taking away of the right of silence and the use of self-incriminating materials would be a blatant and also a serious curtailment of the rights of an accused.

16. The second problem is the new **Section 66F(3).** Its meaning is far from clear. Seemingly the aim of this section is to qualify the protection against the use of self-incrimination but upon several back and forth re-reading of the section, we are left with the impression that, Section 66F(3) in effect nullifies and pushes back any and all the protection of self-incrimination provided in the Section 66F(2). This section is unclear. We invite clarifications by the Government on the meaning, the intended purpose of this Section and the circumstances this Section could apply.

Privilege

17. As a corollary to the above, there is the question on claim for legal professional privilege in response to the request of the Commissioner to produce materials. Section 66D is repeated in the following

"66D. Commissioner's powers to require materials and assistance

(1) This section applies if the Commissioner reasonably suspects that, in relation to a specified investigation, a person –

(a) has or may have possession or control of any material relevant to that investigation; or

(b) may otherwise be able to assist the Commissioner in relation to that investigation.

(2) The Commissioner may, by written notice given to the person, require the person –

(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; ... "

18. If a person has obtained legal advice or privileged materials with respect to a specified investigation, the said legal advice or privileged materials should not be subject to the request for production under **Section 66D(2)(a)**. As with other domestic ordinances, there must be a specific

"carve-out" protection for communications and material covered by legal professional privilege.

19. Apart from the above issues, which are fundamental to the rights of the accused, we have the following comments on various concepts and matters proposed in the Amendment Bill.

"Recklessness" and "Likely"

20. In our above letter to you of 16 June 2021, we have raised our concerns on the *mens rea* requirement for the proposed doxxing offence. As currently drafted, the Amendment Bill provides that the offence is premised, inter alia, upon the offender being "reckless" as to the *consequence* of disclosure. Our earlier expressed concern that the net for the offence could be cast exceedingly wide, has not been addressed in the Amendment Bill. To the contrary the Amendment Bill (with respect) muddles the position by introducing the unhelpful concept of "*likely*". In the new **Section 64 (3A)** and **(3C)** the following are provided (emphasis supplied):

> *"(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—*
>
> *(a) with an intent to cause any specified harm to the data subject or any family member of the data subject; or*
>
> *(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.*
>
> ...
>
> *(3C) A person commits an offence if—*
>
> *(a) the person discloses any personal data of a data subject without the relevant consent of the data subject—*
>
> *(i) with an intent to cause any specified harm to the data subject or any family member of the data subject; or*
>
> *(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; ..."*

21. The proposed offences (irrespective of being the first-tier or the second-tier) are based upon disclosure of personal information without

consent AND the person making disclosure has an intent or is being reckless as to the consequences of disclosure. We agree that *intent* should underscore the policy against doxxing. This is easily understood. However, with respect to the element *recklessness* (when it is presumably known or decided that it cannot be proved there was an *intent* to cause harm), that *mens rea* causes problems, as the concept comes with various degrees of possibility for the accused's state of mind – ranging from extremely reckless, down to a little bit careless. *On top of that* (and irrespective of the degree to be established), the position becomes less exact and more vague when this element 'recklessness' is used with and combines with the concept 'likely', in the formulation "*reckless*" as to whether any specified harm would "*likely*" be caused to the data subject.

22. The above imposes a very difficult task for the Judge and the jury (if constituted) for decision. For example, the criminal liability (if any) in the following scenarios is not straightforward at all:

(a) a person was careless as to whether it was likely that specified harm would arise
(b) a person was reckless as to whether specified harm was possible
(c) a person gave no thought whatsoever as to whether any harm would be caused
(d) a person was careless (or reckless) but did not in their mind expect that any specified harm would be caused (though the Court thinks it was likely).

The borderlines among "reckless", "careless" and "negligent" are very thin and can easily be blurred. We cannot think of any other criminal statutes in Hong Kong that provide for such vagueness in proof of liability as when this is combined with "likely".

23. In summary, the *mens rea* of the proposed offence has been rendered to become extremely vague and uncertain. The threshold for conviction could be unacceptably random.

24. We suggest to delete the words "*or would likely be*" from the sections, and for the Administration to seriously reconsider if recklessness should underline the policy intent.

"Harm" Definition Section

25. The Amendment Bill criminalizes doxxing acts that cause any "specified harm" to the data subject or the family member.

26. "Specified Harm" is defined in the new **Section 64(6)(b)** in the following.

> ***"specified harm** (指明傷害), in relation to a person, means—*
>
> *(a) harassment, molestation, pestering, threat or intimidation to the person;*
>
> *(b) bodily harm or psychological harm to the person;*
>
> *(c) harm causing the person reasonably to be concerned for the person's safety or well-being; or*
>
> *(d) damage to the property of the person."*

27. The way "harm" is defined in the above is unconventional; the wording chosen or the manner of using it for the concepts included in "specified harm" is not formulated in the manner that criminal practitioners are familiar with. Historically in criminal law, practitioners are used to offences involving "harm" and in this regard a distinction is rightly drawn between the effect of an *action* (e.g. assault occasioning actual bodily harm) where there are activities such as assault, and the *result*, which is the harm or the injury. The activity that causes harm is not the same as, and should not be considered as, harm itself.

28. In the above Section 64(6)(b), some of the definitions are consistent with the normal usage in criminal legislation – "bodily harm" ((in sub-para (b) above) and "damage to property" (in sub-para (d) above) relate to physical harm and are understood. These are forms of physical harm, and they result from certain *actions* or *activities* (i.e. doxxing acts).

29. Problems however lie with sub-paragraph (a) in the above as those items are not really "harm", but they are the *activities* or *means* of causing harm to a person. The real intent of the legislation should be to forbid those actions in sub-paragraph (a) such as harassment, molestation etc., that causes harm. As such those activities in sub-paragraph (a) should not be defined as a type of "harm". They should be described as activities, which they are.

30. We suggest the draftsman to consider to remodel sub-paragraph (a) by for instance using subsections to split between activities and their results

(e.g. "*specified harm shall mean the (bodily harm, psychological harm etc. [the harms]) that result from (harassment, molestation, pestering etc. [the activities]*")

31. Sub-paragraph (c) in the above is also problematic and demonstrative of the above comments. That sub-paragraph is on "harm" *causing* the "harm" (i.e. anxiety). The formulation itself is already circular in its meaning and the concept is not clear.

Psychological Harm

32. "Psychological harm" is referred to in **Section 64(b)(b)** for tier-two offences (see paragraph 26 above). There is however no definition or reference in the Amendment Bill on what constitutes psychological harm. It is therefore uncertain as to what kind of psychological condition one has to suffer from, and the extent of any disablement resulting therefrom, before the condition could qualify for this element for the tier-two offences. We have pointed out the necessity to have a definition in the legislation in our letter of 16th June 2021.

33. We note that in the context of PDPO, the Court in the past has relied on expert evidence to determine and assess "psychological harm"[iii]. We anticipate that if this issue is brought up in the future in prosecuting doxxing offences, expert assessment would be called for. If testimony of experts is unavoidably required to define psychological harm for the Court in trials, it is much preferable to now include the definition (or any tests) in the legislation. That saves the Court's time and efforts every time when this issue is relied upon or argued. It also helps the community to better understand what is encompassed in the doxxing offences.

34. It is trite that in enacting a piece of criminal law, people should understand the parameters of what they are allowed or not allowed to do. Clear definitions of terms are required. The lack of any definition of psychological harm (for tier two offences) raises serious concerns.

Intent to Defraud by Doing Nothing?

35. The Amendment Bill provides for criminal investigation by the Privacy Commissioner for Personal Data (the "Commissioner") and the offences for failing to comply with the requirements of the Commissioner. The new **Section 66E** provides the following.

> ***66E. Offences in relation to section 66D***
>
> *(1) A person commits an offence if the person fails to comply with a requirement of a notice given to the person under section 66D(2).*
>
> ...
>
> *(5) A person commits an offence if the person, with intent to defraud—*
>
> *(a) fails to comply with a requirement of a notice given to the person under section 66D(2); or*
>
> *(b) in purported compliance with such a requirement, provides any material, gives any answer, directions, explanation or particulars, or makes any statement that is or are false or misleading in a material particular.*

36. We have in our earlier letter to you already raised the query as to how one could defraud someone by *not* doing an act (to comply with the Commissioner's notice – **Section 66E(5)(a)** above). While one might not cooperate with the Commissioner as required under the legislation, his uncooperativeness (e.g. by refusing to provide the Commissioner with materials, or to answer his questions etc.) by itself and without any other evidence cannot be taken to mean that he intends to defraud the Commissioner. In point of fact, under the common law system, we cannot comprehend any situations where one could establish criminal intent (intent to defraud) by the only reason of not complying with a requirement. We invite the Government to explain those situations where the *mens rea* could arise in the above.

37. If uncooperativeness is to be criminalized, then Section 66E(1) already provides for such an offence.

38. If the intention to defraud the Commissioner (by giving misleading answers, false documents etc.) is to be criminalized, then Section 66E(5)(b) provides for the offence.

39. In the circumstances, we do not see why Section 66E(5)(a) is needed or justified. We ask that this sub-section be removed.

Powers to stop, search and arrest persons

40. In the new section 66H, there is a sub-section (3)(b)(ii) that allows an officer to take possession of anything that "*may throw light on the character or activities of the person*".

> ***"66H. Powers to stop, search and arrest persons***
>
> ...
>
> *(3) If an authorized officer has arrested a person (**arrested person**) under subsection (1), the officer may search for and take possession of anything that-*
>
> ...
>
> *(b) The officer reasonably suspects –*
>
> ...
>
> *(ii) may throw light on the character or activities of the person.*

41. The language used in this **Section 66H(3)(b)(ii)**, on one hand, is (with respect) amateurish and, on the other, dangerously wide, as (a) the Section 66H search may not be directed to the purpose of the offence and (b) no relevancy needs to be shown. As worded, it is carte blanche to take away anything from say a person's home and have a look through it to see what may be found of interest. This is not acceptable and the Section needs to be amended. We also refer to our comments on legal professional privilege (at paragraph 18 above).

Sentence

42. The new **Section 64** provides for the following sentencing

> "*(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.*
>
> ...
>
> *(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."*

43. Various commentators have already expressed views on levels of sentencing for the proposed doxxing offence. In this regard, we note that for

example in Singapore, the penalty for a similar offence is $5,000 (equivalent to HKD 28,600.00 (circa)) or an imprisonment term of not exceeding 6 months[iv].

44. It seems to us that, in terms of sentencing, the proposed sentence takes into account not only the conduct but also the most serious potential consequences of doxxing. For example, X discloses online and without consent the personal details of a police officer P, including those of his family. This results in the daughter of the P being identified and seriously injured by the daughter's classmates B and C (by reason of the personal hatred of B and C against police officers). Then, if X is to be found guilty of his doxxing acts, X would face the sentence which, under the Amendment Bill, seems to reflect not only the act but also the consequences of his doxxing (i.e. injury caused to P's daughter).

45. To us, it appears that the doxxing offence is intended to and should cover only the wrongful disclosure of peoples' personal details with an intent to harm, or to embarrass the victims. It is not to be confused with other serious offences e.g. physical abuses, criminal intimidation etc. which are addressed by other criminal statutes (In the above example, B and C should be criminally liable for injury caused to P's daughter). If a doxxing is carried on via internet resulting in the commission of a serious offence, the criminal conduct arising from doxxing would be covered by a separate statute. The present approach seems to have doxxing offences projected into other criminal offences.

46. On this analysis, for doxxing *per se*, a maximum of 5 years' term of imprisonment (for a Section 64(3C) offence) seems to us to be on the high side.

Freedom of Expression

47. We welcome the explanation [v] by the Government that the legislative exercise does not aim to impose internet blackouts (see also new **Section 66L(2)(b)**). Yet, it is not comfortably clear as to how the doxxing offence would be applied to the media, without curtailing freedom of expression. For instance, would it be an offence for a journalist or other media entity to publish certain information of a person without consent (such as a photograph[vi]) if the publisher was reckless as to whether harm was caused? We invite the Government to consider issuing practice notes or guidelines for journalists and the media industry. That may on the other hand also help the

media industry as well as the international community to better understand the continual guarantee of free speech under the new legislation.

Concerns for intermediaries in assisting in decryption and/or search of electronic devices

48. Under the new **section 66G** a magistrate will be empowered to issue a warrant authorising the Commissioner or any prescribed officer etc. to exercise a wide range of powers in relation to, among other things, an electronic device:

- A warrant can be issued if there are reasonable grounds for suspecting that one of the specified offences under subsection (1)(a) has been, is being or is about to be committed, and any material that is or contains evidence for the purposes of a specified investigation is stored in an electronic device.
- Under subsection (3), the powers in relation to an electronic device include, among other things: (c) to decrypt any material stored in the device, and (d) to search for any materials stored in the device.
- Subsection (6) further requires that a specified person must, without charge, afford facilities and assistance reasonably required by the Commissioner or any prescribed officer for the purposes of the specified investigations.

*"**66G. Powers exercisable in relation to premises and electronic devices***

(1) If a magistrate is satisfied ... that there are reasonable grounds for suspecting—

(a) 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; and

(b) that—

(i) there is in any premises any material that is or contains evidence for the purposes of a specified investigation; or

(ii) any material that is or contains evidence for the purposes of a specified investigation is stored in an electronic device,

the magistrate may issue a warrant (warrant) ... to exercise the powers referred to in subsection (2) or (3), as the case may be.

...

> *(3) The powers that may be exercised in relation to an electronic device mentioned in subsection (1)(b)(ii) are—*
>
> *...*
>
> *(c) to decrypt any material stored in the device;*
>
> *(d) to search for any material stored in the device that the Commissioner or any prescribed officer reasonably suspects to be or to contain evidence for the purposes of the specified investigation (**relevant material**);*
>
> *....*
>
> *(6) When powers are exercised under the warrant, a specified person must, without charge, afford facilities and assistance reasonably required by the Commissioner or any prescribed officer for the purposes of the specified investigation.*

49. Prima facie, the obligation set out in the above section is onerous - if it is intended that a warrant can be issued against intermediaries such as electronic platforms, intermediary service providers or hosting service providers to assist in decrypting and/or to search for materials in any electronic devices that they possess or control (such as any servers or any other devices that they possess or control). It is presently unclear under section 66G(6) what is meant to be facilities and assistance *"reasonably required"* to be afforded by the person subject to the warrant. There would be serious concern from service providers because by offering the assistance, not only will the service providers' own security be likely compromised by having to offer decryption assistance, but these service providers' customers' data security could also be compromised due to the fact that some staff of the service providers are to be required to be able to access and search for their customers' data stored in the service providers' electronic devices. The service providers may as a result be tempted to move their electronic devices (e.g. servers) outside of Hong Kong. This could impact upon Hong Kong as a regional and international data hub.

50. Accordingly, we urge the Government to clarify the drafting of section 66G, and preferably to carve out the application of section 66G upon electronic platforms or intermediary service providers or hosting service providers.

Lawful excuse vs reasonable excuse

51. **Section 66I** provides that a person who obstructs, hinders or resists a section 66G enforcement without "lawful excuse" commits an offence:

> "***66I. Offence in relation to sections 66G and 66H***
>
> *(1) A person commits an offence if ... without lawful excuse, obstructs, hinders or resists—*
>
> *(a) the Commissioner;*
> *(b) a prescribed officer;*
> *(c) a person authorized by the Commissioner for the purposes of section 66H; or*
> *(d) a person assisting the Commissioner or a prescribed officer.*
>
> *(2) A person who commits an offence under subsection (1) is liable on conviction to a fine at level 3 and to imprisonment for 6 months.*
>
> *(3) In criminal proceedings for an offence under subsection (1)—*
>
> *(a) the burden of establishing that a person has a lawful excuse referred to in subsection (1) lies on the person; and*
>
> *(b) the person is taken to have established that the person had such a lawful excuse if—*
>
> *(i) there is sufficient evidence to raise an issue that the person had such a lawful excuse; and*
> *(ii) the contrary is not proved by the prosecution beyond reasonable doubt.*"

52. We note and we have compared **section 66O** in respect of contravention of cessation notices. Subsection (2) provides for the defence of "reasonable excuse". Subsection (2)(b) provides a number of examples which may qualify as "reasonable excuse":

> "***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 to establish that—*
>
> *(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 action 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.

(3) The person is taken to have established a matter that needs to be established for the purpose of a defence under subsection (2) if—

(a) there is sufficient evidence to raise an issue with respect to the matter; and

(b) *the contrary is not proved by the prosecution beyond reasonable doubt.*"

53. On the above two different defences, we urge the Government to clarify-

(a) whether the term "*lawful excuse*" under section 66I has the same meaning as the term "*reasonable excuse*" under section 66O;

(b) if not, the reason for there to be such a difference;

(c) whether specific examples under section 66I may be provided so that more guidance can be given as to what qualifies as "lawful excuse" (if the term "lawful excuse" under section 66I is indeed intended to be different from the term "reasonable excuse" under section 66O).

Concluding Remarks

54. In the light of the unlawful doxxing committed in the past few years and the serious breaches of data privacy, it is important to have an updated regime on personal data protection. The Amendment Bill put forward to address the above however appears to be premised upon an approach which in some aspects has been misconceived. In addition, the practical application of some of the provisions of the proposed legislation is not clear, for reasons we have set out above. We ask that those issues we have identified in this and in our last letter to you of 16 June 2021 be examined carefully and taken

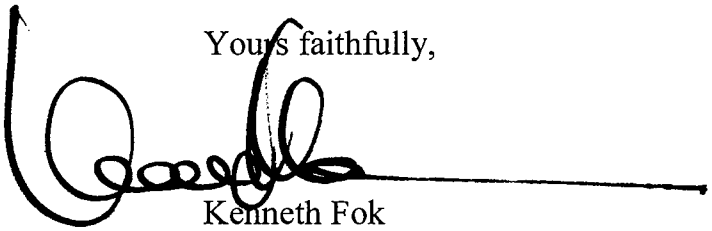
into account. In our view, this legislative exercise should not, inadvertently or otherwise, become an erroneous one by reason of haste or imperfect drafting, or an over-reaction to the surge of unlawful doxxing amid and after the 2019 social events.

55. We have raised serious concerns regarding some of the provisions in the Amendment Bill.

56. We are copying this letter to the Bills Committee of the Legislative Council on the Amendment Bill. For your information we are prepared to, and we offer to, attend the Bills Committee meetings in order to further explain the above views.

57. Thank you for your attention.

Yours faithfully,



Kenneth Fok
Director of Practitioners Affairs
The Law Society of Hong Kong

Encl.
cc. The Bills Committee on Personal Data (Privacy) (Amendment) Bill 2021

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[i] See **Article 11 (2)(g) Hong Kong Bill of Rights**

[ii] See **s. 183 of the Securities and Futures Ordinance ("SFO")** - the SFC can compel an interview relating to the matters under investigation. During an interview, there is no right to remain silent on the basis of self-incrimination, and a failure to answer questions is a criminal offence (see s. 184 of the SFO). Section 187(2) of the SFO prohibits direct use of the compelled information as evidence in criminal proceedings against the interviewee, but such evidence may be used in subsequent criminal proceedings by the SFC and/or the ICAC against others (including co-conspirators of the interviewee).

Another example is **s. 14(1) of the Prevention of Bribery Ordinance** ("POBO") which provides that the ICAC can hold an interview under compulsion, and failure to comply without reasonable excuse is a criminal offence (see s. 14(4) of the POBO). Section 20 of the POBO prohibits direct use of any compelled information as evidence to incriminate the interviewee in criminal proceedings, but the agencies are not prohibited from using such information in criminal proceedings against any other person. Derivative use of the compelled information is allowed.

[iii] See *香港特別行政區 v 陳景僖* [2020] HKDC 890, [2020] CHKEC 945. In this case Court accepted the psychological expert opinion and held that doxxing had caused the above psychological harm.

[iv] See Article 3 of the Protection from Harassment Act 2020.

[v] See e.g. the media statement by the Commissioner of 9 July 2021.

[vi] Assuming the photographs could be personal data: See the judgment of *Eastweek Publisher limited v Privacy Commissioner for Personal Data* CACV 331/1999

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Dear Sir,

Proposed Doxxing Offence

The Law Society is studying a Legislative Council paper *LC Paper No. CB(4)974/20-21(03)* ("LegCo Paper") on doxxing.

2. In the LegCo Paper, among other things, there is a proposal to amend Section 64 of the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO") to introduce a "doxxing offence". There are also legislative proposals to e.g. empower the Privacy Commissioner for Personal Data (the "Commissioner") to carry out criminal investigations.

3. We agree that the problem of doxxing needs to be addressed. While we await the amendment bill, we have the following preliminary observations upon review of those matters outlined in the LegCo Paper.

"Recklessness"

4. The scope of the proposed doxxing offence is set out in the LegCo Paper in the following (paragraph 10) (with emphasis supplied):

"A person commits an offence if the person discloses any personal data of a data subject without the data subject's consent,

(a) with an intent to threaten, intimidate or harass the data subject or any immediate family member, or being reckless as to whether the data subject or any immediate family member would be threatened, intimidated or harassed; or

(b) with an intent to cause psychological harm to the data subject or any immediate family member, or being reckless as to whether psychological harm would be caused to the data subject or any immediate family member; ..."

5. The policy intent underlining the above requirement of "reckless" - as to the *consequence* of the disclosure of personal data (and not reckless as to the disclosure of personal data itself) – has not been made clear in the LegCo Paper. As the matter now stands, this proposed *mens rea* requirement casts a very wide net of criminal liability. Without further information, we query whether this is a balanced approach to be adopted in combating doxxing. We anticipate a clear policy justification to be provided, when the amendment bill is gazetted.

"Psychological harm"

6. We also note the reference to "psychological harm" in the above provisions. The term "psychological harm" is not explained in the LegCo Paper. It is not clear to us as to whether that includes e. g. only a transient stress or that a recognizable psychological defect with clinical diagnosis is called for. Also the LegCo Paper has not explained how such harm will be established and/or proved. Again, we await clarification of the above in the amendment bill.

7. As a corollary, what about "physical harm"? Should the law also cover situations when doxxing has caused e.g. a young person to commit suicide? All these should be considered carefully by the Government.

Criminal Investigation Power of the Commissioner

8. Paragraph 13 of the LegCo Paper is on the criminal investigation power proposed for the Commissioner. The following proposal is noted (emphasis supplied):

> *"It is an offence for the person to*
>
> *(a) without reasonable excuse fails to comply with the Commissioner's criminal investigation; or*
>
> *(b) with intent to defraud, refuses to comply with the Commissioner's investigation, or deliberately gives any answer or provides any information, documents or things that are false or misleading ..."*

9. The second limb (b) in the above is difficult to be understood, as it includes a *mens rea* requirement of an intention to defraud the Commissioner. The usual and common understanding is that one has to be engaged in some positive acts if he intends to defraud other persons. It is not clear to us as to how one can defraud someone by not doing (or by refusing to do) something. We query whether the drafting for this second limb (b) in the above is intended to mean "*misleads* the Commissioner's investigation", instead of "*refuses to comply* with the Commissioner's investigation".

10. In any event, a very fundamental question we notice is that the above provision puts forward and imposes a positive duty upon the person under investigation to assist the Commissioner. This is in stark contrast to the usual common law position where an accused is afforded the protection against self-incrimination. We are concerned of the above suggestion, and ask for the justification for the removal of this usual protection from a doxxing offence.

11. There are other issues in the LegCo Paper that we are looking at. These include:

(a) the proposed penalty (including whether the proposed penalty is proportional to the other offences under the PDPO);

(b) the defence available for the doxxing offence – e.g. would all the exceptions under the PDPO be also available as a defence to the

doxxing crime and such include section 58 crime exception? In our views, there should also be also a discussion on whether the defence could impede upon legitimate investigations and enforcement activities.

(c) The enforcement of the Rectification Notice (paragraph 16 of the LegCo Paper) – including how the Commissioner could effectively enforce the Rectification Notice over any internet platforms that are hosted out of the jurisdiction if they do not comply with the Commissioner's investigation. Would the Commissioner have a right to request Internet Service Providers ("ISPs") in Hong Kong to block access to those platforms? If yes, would those ISPs be vicariously liable in the event they fail to comply – and if so, what would be the consequences or penalties?

We will make further comments on the above and other related matters as appropriate in due course.

General policy direction

12. On a separate but related note, the LegCo Paper focuses exclusively on doxxing, when on the other hand the PDPO is far behind similar laws and regulations in other jurisdictions, in terms of provisions set up to protect personal data. Hong Kong is far behind other countries in this respect. If the mandate of the Bureau for the current amendments is limited only to bring in a doxxing offence, then certainly a wider and a more thorough revision to the data protection regime is called for, and should be engaged as soon as possible. That would improve the protection of the personal privacy of the Hong Kong citizens; it would also help the updating of the data protection regime for the Hong Kong SAR in order that that could be aligned with international jurisdictions.

13. There should also be a policy consideration that the purposes of enacting doxxing law should not be limited only to protecting the personal data of police or other public officers, but in fact should also be for protecting the personal data of everyone in the society, including young people. It is quite alarming that doxxing has been used a means of cyberbullying amongst

young people and that has long been a prevalent problem which our laws need to tackle (see, for example, https://pubmed.ncbi.nlm.nih.gov/30486402/). The above policy objective should be made clear in the amendment bill.

14. We thank you in advance for your attention to our initial comments in the above, and we look forward to hearing feedback from you.

Yours faithfully,

Kenneth Fok
Director of Practitioners Affairs
The Law Society of Hong Kong