

立法會
Legislative Council

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**Paper for the House Committee Meeting
on 23 July 2021**

**Legal Service Division Report on
Personal Data (Privacy) (Amendment) Bill 2021**

I. SUMMARY

- 1. The Bill** The main object of the Bill is to amend the Personal Data (Privacy) Ordinance (Cap. 486) to:

 - (a) amend and create offences for disclosing personal data without consent;
 - (b) confer on the Privacy Commissioner for Personal Data ("Commissioner") investigative and enforcement powers for those offences and related matters, including powers to require provision of materials and assistance, to enter and search premises, to access and search electronic devices, to serve cessation notices and to apply for injunctions;
 - (c) enable the Commissioner to prosecute certain offences in the Commissioner's name; and
 - (d) provide for related matters and minor amendments.

- 2. Public Consultation** The Commissioner consulted the Personal Data (Privacy) Advisory Committee on 25 May 2021, as well as the Standing Committee on Technology Developments on 3 June 2021. The Commissioner also exchanged views with the Asia Internet Coalition. Members of the two Committees are supportive of the legislative proposals, while the Coalition gave some comments on the proposals.

- 3. Consultation with LegCo Panel** The Panel on Constitutional Affairs was consulted on the legislative proposals on 17 May 2021. Members expressed various concerns on the proposals.

- 4. Conclusion** The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. Since the Bill proposes to amend the existing regulatory regime under Cap. 486 by introducing new offences and new enforcement powers, Members may consider forming a Bills Committee to study the Bill in detail.

II. REPORT

The date of First Reading of the Bill is 21 July 2021. Members may refer to the Legislative Council ("LegCo") Brief (File Reference: CMAB/CR/7/22/45) issued by the Constitutional and Mainland Affairs Bureau on 14 July 2021 for further details.

Object of the Bill

2. The main object of the Bill is to amend the Personal Data (Privacy) Ordinance (Cap. 486) to:

- (a) amend and create offences for disclosing personal data without consent;
- (b) confer on the Privacy Commissioner for Personal Data ("Commissioner") investigative and enforcement powers for those offences and related matters, including powers to require provision of materials and assistance, to enter and search premises, to access and search electronic devices, to serve cessation notices and to apply for injunctions;
- (c) enable the Commissioner to prosecute certain offences in the Commissioner's name; and
- (d) provide for related matters and minor amendments.

Background

3. Under the existing regulatory regime, it is an offence under section 64(2) of the Personal Data (Privacy) Ordinance (Cap. 486) to disclose personal data obtained from a data user without the data user's consent where such disclosure causes psychological harm to the data subject. According to paragraph 3 of the LegCo Brief, in the context of doxxing cases where personal data is often dispensed and reposted repeatedly on online platforms, the Office of the Privacy Commissioner for Personal Data and the police often encounter great difficulties in tracing the source of the doxxing contents to ascertain (i) the identity of the data user and (ii) whether the personal data was obtained from the data user without the data user's consent. As such, the Administration proposes to introduce new offences under Cap. 486, as well as new enforcement powers of the Commissioner, in order to curb doxxing acts.

Provisions of the Bill

4. Major provisions of the Bill are summarized in the ensuing paragraphs.

Proposed new offences for disclosure of personal data without the data subject's consent

5. Under the Bill, it is proposed that the existing offence under section 64(2) of Cap. 486 be replaced by two new offences under a two-tier structure. The first-tier offence would be a summary offence (proposed new section 64(3A)) for disclosing personal data without the data subject's consent, and the discloser has (i) an intent to cause any specified harm to the data subject or any family member of the data subject, or (ii) is 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. Under the proposed new section 64(6), "specified harm" is proposed to mean (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. It is proposed that any person who commits the above first-tier offence would be liable to a fine at level 6 (i.e. \$100,000) and imprisonment for two years.

6. The second-tier offence would be an indictable offence (proposed new section 64(3C)). A person would commit the offence if specified harm is actually caused to the data subject or the data subject's family member as a result of the disclosure of personal data without the data subject's consent. It is proposed that any person who commits the above second-tier offence would be liable on conviction on indictment to a fine of \$1,000,000 and imprisonment for five years.

Proposed new investigative and enforcement powers of the Privacy Commissioner for Personal Data

7. Under the Bill, it is proposed that the Commissioner (or any person authorized by the Commissioner) would have certain new investigative and enforcement powers, including the powers to:

- (a) request relevant materials (i.e. documents, information or things) from any person, or require any person to answer relevant questions in aid of an investigation into certain offences under Cap. 486, including the proposed new offences under the proposed new section 64(3A) and (3C) (proposed new section 66D);
- (b) apply for a warrant to (i) enter and search premises and seize materials for the purposes of an investigation into certain offences under Cap. 486 or (ii) access and search (and decrypt any material stored in) an electronic device (proposed new section 66G);
- (c) stop, search and arrest without warrant any person reasonably suspected of having committed certain offences under Cap. 486 (proposed new section 66H); and

- (d) apply to the Court of First Instance for an injunction where a person has engaged, is engaging or is likely to engage in conduct that would constitute an offence under section 64 of Cap. 486 (including the proposed new section 64(3A) and (3C)) (proposed new section 66P).

8. The Bill seeks to introduce certain offences in relation to the above powers of the Commissioner. For instance, any person who fails to provide the Commissioner with any material relevant to an investigation which is in the person's possession or control would commit an offence and would be liable on summary conviction to a fine at level 5 (i.e. \$50,000) and imprisonment for six months, or on conviction on indictment to a fine of \$200,000 and imprisonment for one year.

Proposed new power of the Commissioner to prosecute certain offences in the Commissioner's name

9. It is proposed under the Bill that the Commissioner would be empowered to prosecute certain offences under Cap. 486, including the proposed offence under the proposed new section 64(3A), or an offence of conspiracy to commit such an offence, in the name of the Commissioner. Under the proposed new section 64C(2), an offence prosecuted by the Commissioner must be tried before a magistrate as an offence that is triable summarily.

Proposed new power of the Commissioner to serve a cessation notice

10. Under the proposed new section 66M, the Commissioner would be empowered to serve a cessation notice directing a cessation action to be taken by (i) a Hong Kong person (i.e. an individual present in Hong Kong or a body of persons incorporated, established or registered in Hong Kong or has a place of business in Hong Kong), or (ii) a non-Hong Kong service provider (i.e. a person not being a Hong Kong person, that has provided or is providing any service to any Hong Kong person, irrespective of whether such service is provided in Hong Kong or not) where the Commissioner has reasonable grounds to believe that the below conditions are satisfied:

- (a) there is a disclosure (whether or not in Hong Kong) of personal data made via a written or electronic message without the data subject's consent, satisfying the elements of the offence under the proposed new section 64(3A);
- (b) the data subject is a Hong Kong resident or is present in Hong Kong when the disclosure is made; and
- (c) the Hong Kong person or the non-Hong Kong service provider is able to take the cessation action (whether or not in Hong Kong).

11. A cessation notice would specify the cessation action that has to be taken, i.e. any action to cease or restrict the disclosure made by e.g. removing the message from the electronic platform on which such message is published, or discontinuing the hosting service for the part of or the whole of the relevant platform on which the message is published. A person who contravenes a cessation notice would commit an offence and be liable on a first conviction to a fine at level 5 (i.e. \$50,000) and imprisonment for two years, and to a further fine of \$1,000 for every day during which the offence continues. On each subsequent conviction, the person would be liable to a fine at level 6 (i.e. \$100,000) and imprisonment for two years, and to a further fine of \$2,000 for every day during which the offence continues.

12. It is proposed that an appeal could be made to the Administrative Appeals Board established under the Administrative Appeals Board Ordinance (Cap. 442) against a cessation notice by the person served with the notice or any other person affected by the notice. Under the proposed new section 66N(2), such appeal would not affect the operation of the cessation notice.

Other related and consequential amendments

13. Other proposed amendments include amending section 68 of Cap. 486 to allow for service of cessation notices to addresses outside Hong Kong or by electronic transmission, and providing for transitional matters and consequential amendments.

Commencement

14. The Bill, if passed, would come into operation on the day on which it is published in the Gazette as an Ordinance.

Public Consultation

15. According to paragraph 22 of the LegCo Brief, the Commissioner consulted the Personal Data (Privacy) Advisory Committee on 25 May 2021, as well as the Standing Committee on Technology Developments on 3 June 2021. Members of the two Committees are supportive of the legislative proposals. The Commissioner also exchanged views with the Asia Internet Coalition. While the Coalition agreed that doxxing is a matter of serious concern and that it is necessary to combat doxxing in order to protect personal data privacy, it urged the Administration to define doxxing clearly in the Bill and consider the possible legal liability of employees of Hong Kong subsidiaries or offices of overseas intermediaries in future.

Consultation with LegCo Panel

16. As advised by the Clerk to the Panel on Constitutional Affairs, the Panel was consulted on the legislative proposals on 17 May 2021. While members were generally supportive of the proposals, some members considered that the proposed threshold relating to psychological harm caused by disclosure is too high, rendering conviction for doxxing acts difficult. Some members also expressed concerns about the ability of the Commissioner to request removal of web links containing personal data where the online platform is registered overseas, and whether the proposals can effectively deal with doxxing acts on instant messaging platforms.

Conclusion

17. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. Since the Bill proposes to amend the existing regulatory regime under Cap. 486 by introducing new offences and new enforcement powers, Members may consider forming a Bills Committee to study the Bill in detail.

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