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**Paper for the House Committee meeting
on 10 September 2021**

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

Purpose

This paper reports on the deliberations of the Bills Committee on Personal Data (Privacy) (Amendment) Bill 2021.

Background

2. 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.

3. Since June 2019, there has been an upsurge of doxxing activities in which personal data is often dispensed and reposted repeatedly on online platforms. As the existing section 64 of Cap. 486 is not intended for addressing the doxxing cases in recent years, the Office of the Privacy Commissioner for Personal Data ("PCPD") 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. In order to curb doxxing behaviours more effectively, the Administration proposes to introduce new offences under Cap. 486 as well as new enforcement powers of the Privacy Commissioner for Personal Data ("the Commissioner").

The Bill

4. The main object of the Bill is to amend Cap. 486 to:

- (a) amend and create offences for disclosing personal data without consent;
 - (b) confer on the 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.
5. The Bill, if passed, would come into operation on the day on which it is published in the Gazette as an Ordinance.

The Bills Committee

6. At the House Committee meeting on 23 July 2021, Members agreed to form a Bills Committee to scrutinize the Bill. Under the Chairmanship of Ms Alice MAK Mei-kuen, the Bills Committee has held three meetings with the Administration.¹ The membership list of the Bills Committee is in **Appendix I**.

Deliberations of the Bills Committee

7. While members are supportive of the Bill, they have expressed concerns over various issues. Their major views and concerns are summarized in the ensuing paragraphs.

Need for the proposed legislative amendments

8. Some members have sought information on the *ex parte* applications made by the Secretary for Justice ("SJ"), the Commissioner of Police and the Junior Police Officers' Association of the Hong Kong Police Force respectively for injunctions to restrain persons from unlawfully and wilfully conducting doxxing activities, and the penalty for breaching an injunction order.

¹ The Administration's response to the written submissions received can be accessed on the website of the Legislative Council.

9. The Commissioner has advised that the Court has, in response to the aforesaid injunction applications, granted various interim injunction orders to protect specific groups or persons from being doxxed. Any breach of the injunction orders by any person may constitute civil contempt of court and such person may be liable to imprisonment or a fine. For example, four persons were convicted of contempt of court for violating the relevant injunction orders last year. One defendant was sentenced to 21 days' immediate imprisonment while the other three were sentenced to 21 days' or 28 days' imprisonment, suspended for one year. As injunctions are by nature civil remedies, there are no criminal records for the violation of injunction orders.

10. Some members have enquired how effective the proposed legislative amendments will be in combating doxxing activities. The Administration and the Commissioner have advised that the Bill seeks to empower the Commissioner to carry out criminal investigation, collect evidence and institute prosecution, without the need to refer the doxxing cases to the Police to conduct criminal investigation or the Department of Justice ("DoJ") to take prosecution action, which will greatly help expedite enforcement actions against doxxing cases. Moreover, the Commissioner is currently not empowered under Cap. 486 to request for the removal of doxxing contents from online platforms and websites. PCPD can only repeatedly write to operators of the websites, online social media platforms or discussion forums concerned to request the doxxing contents be removed. As compliance with such requests is not mandatory from the legal perspective, only about 70% of the related web links have been removed. There is a real need to amend Cap. 486 to provide PCPD with the statutory power to demand the cessation of disclosure of doxxing contents.

Definition of "family member"

11. Clause 3 of the Bill amends section 2 of Cap. 486 by adding the definition of "family member" to section 2(1) of Cap. 486. Clause 5 of the Bill amends section 63C of Cap. 486 to delete "immediate" from the term "immediate family member" in the English text of section 63C(1)(b) of Cap. 486, and repeal section 63C(2) of Cap. 486 which provides the definition of "immediate family member".

12. The Legal Adviser to the Bills Committee has enquired about the implications for using "family member" instead of "immediate family member" in the English text of the Bill, especially given that the Chinese text "家人" remains unchanged. The Administration has advised that the amendment has the purpose of providing a definition of "family member" applicable generally to the whole Cap. 486. Such definition will also reflect accurately the policy intent of offering anti-doxxing protection to data subjects and their family members under the Bill. The definition of "family member" in the Bill is proposed to be "in relation to a

person, means another person who is related to the person by blood, marriage, adoption or affinity", which is the same as the definition of "immediate family member" under the existing section 63C of Cap. 486.

13. Members note that the Chinese text of the definition of "family member" (家人) in the Bill is "家人就任何人而言，指藉血緣、婚姻、領養或姻親關係而與該人有親屬關係的人。", while "immediate family member" in section 63C of Cap. 486 provides "家人就某人而言，指藉血緣、婚姻、領養或姻親關係而與該人有關係的另一人。". There is concern as to whether the scope of "family member" has been altered with the addition of "親屬" in the Chinese text. The Administration has advised that "親屬" is added to better reflect the meaning of "affinity" in the English text under the relevant dictionary meaning; and is also in line with the policy intent. In practice, there will not be any change to the scope of the term "family member" under Cap. 486.

14. To better reflect the policy intent and to fully embrace the meaning of "family member", there is a suggestion that the Administration should consider amending the definition of "family member" in the Bill to include cohabiting partners. Some members opine that the Bill should not only protect the data subjects and their family members, but also their working partners.

15. The Administration has advised that 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 Cap. 486. Also, 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 relationship.² If the Bill proposes to cover cohabitation relationship, it may be difficult to prove the cohabitation relationship with concrete evidence during enforcement, reducing the efficiency of investigation or enforcement. In

² Section 3B(2) of the Domestic and Cohabitation Relationships Violence Ordinance (Cap.189), stipulates that in determining whether two 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; and
- (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.

fact, if the offender of doxxing acts has an intent to cause any specified harm to the cohabitant/working partner of an individual or is being reckless as to whether any specified harm would be, or would likely be, caused to the cohabitant/working partner when disclosing his/her personal data, the cohabitant/working partner can be directly protected as a data subject under the Bill, and DoJ or PCPD may follow up and initiate prosecution in accordance with the proposed section 64 of the Bill.

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

16. The Bill proposes to replace the existing offence under section 64(2) of Cap. 486 by two new offences under a two-tier structure. The first-tier offence is a summary offence (proposed section 64(3A)) for disclosing personal data without the data subject's relevant consent and the discloser (i) has an intent to cause any specified harm, or (ii) is being reckless as to whether any specified harm would be, or would likely be, caused to the data subject or his/her family members. Any person who commits the first-tier offence may be liable to a fine at level 6 (i.e. \$100,000) and imprisonment for two years.

17. The second-tier offence is an indictable offence (proposed section 64(3C)). A person commits the offence if, in addition to the elements of the first-tier offence, any specified harm is actually caused to the data subject or his/her family members as a result of the disclosure. Any person who commits the aforesaid second-tier offence may be liable on conviction on indictment to a fine of \$1,000,000 and imprisonment for five years.

18. Under the proposed 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.

Conviction threshold

19. Some members have expressed concern that the prosecution of offence will be hindered as the prosecution has to prove the discloser's intent to cause specified harm, or recklessness as to whether any specified harm would be, or would likely be, caused to the data subject or his/her family members.

20. The Administration has advised that in deciding whether a discloser has an intent to cause any specified harm or is being reckless as to whether any specified harm would be, or would likely be, caused to the data subject and his/her family members, the prosecutor and the Court will take into consideration the actual

circumstances and evidence of each case. Whether an act falls within the definition of "recklessness" will be determined in accordance with 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 will exist, or in respect of a result if he/she is aware of a risk that it will occur, and it is, in the circumstances known to him/her, unreasonable to take the risk, he/she will be regarded as "reckless" under such circumstances. On the contrary, the defendant will not be found guilty if he/she genuinely does not appreciate or foresee the risks involved in his/her actions due to his/her age or personal characteristics.

21. Some other members opine that it is difficult to assess whether the doxxing acts have in fact caused psychological harm to the data subject or his/her family members, which may result in acquittal of the defendant. For example, public figures may be more resilient to doxxing with no apparent psychological harm caused to them. The Administration has advised that when the Panel on Constitutional Affairs was consulted on the proposed legislative amendments, members expressed concern over the high threshold of "causing psychological harm". As such, two new offences under a two-tier structure are introduced in the Bill. Besides, in determining whether the disclosure has caused "psychological harm" to the data subject, the Court will take into account forensic evidence such as the data subject's psychological report and medical practitioners' advice.

22. Members have enquired whether (i) a person who uploads the family photo of an individual to the internet, (ii) a person who reposts doxxing contents containing personal data obtained from the public domain on online platforms, and (iii) an internet talk show host who discloses the personal data of a data subject and his/her family members in a talk show will commit an offence under the Bill.

23. The Administration has advised that "personal data" under Cap. 486 means any data relating directly or indirectly to a living individual from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and in a form in which access to or processing of the data is practicable. Any person disclosing (at online discussion forums, instant messaging platforms) others' personal data without the data subject's consent, no matter whether the personal data is obtained from the public domain, must consider whether specified harm would be, or would likely be, caused to the data subject or any family member of the data subject by the disclosure. Generally speaking, a discloser who publishes/reposts messages containing personal data without the data subject's relevant consent, and with an intent to cause specified harm or is being reckless as to whether specified harm would be, or would likely be, caused to the data subject or his/her family members, will contravene the proposed section 64(3A) of the Bill. Each case is fact-sensitive and whether the discloser will be liable depends on all the relevant facts, circumstances and available evidence of each case.

24. There are views that the Administration should consider holding an organization liable if its employees disclose customers' personal data without the organization's consent. Concern has also been raised about possible abuse of the personal data contained in public registers maintained by the Government for doxxing-related purposes. The Commissioner has advised that PCPD will consider examining issues relating to the misuse of public registers with a view to making recommendations to the Administration on ways to further enhance the protection of personal data. The Administration has supplemented that the Chief Executive has directed the relevant bureaux/departments to examine the current arrangements for access to public registers and legislative amendments will be recommended where appropriate.

25. Some members have enquired whether a defendant who is convicted of a summary offence under the proposed section 64(3A) will be prosecuted for an indictable offence under the proposed section 64(3C) when further evidence comes to light. The Commissioner has advised that according to the rule against double jeopardy, a person cannot be prosecuted again for the act for which prosecution has previously been brought against the person. Hence, PCPD will conduct thorough investigation and fully evaluate the evidence of the case before instituting any prosecution.

26. In response to members' request for information on overseas/international practices in criminalizing doxxing acts and restricting disclosure of doxxing contents, the Administration has provided details of the doxxing offences in Singapore, New Zealand and Australia for members' reference. Members note that penalties for doxxing offences in the jurisdictions concerned are similar to those proposed in the Bill.³

"Specified harm"

27. There are views that the Administration should consider stipulating the interpretation of the terms "harassment", "molestation", "pestering", "threat" or "intimidation" in the definition of "specified harm" in the proposed section 64(6) of Cap. 486 to avoid doubt. The Legal Adviser to the Bills Committee further pointed out that for instance, the Sex Discrimination Ordinance (Cap. 480) provides for the meaning of "harassment".

28. The Administration has advised that the abovementioned wordings in the definition of "specified harm" in the Bill are largely consistent with the wording used in the injunction orders obtained by SJ from the Court of First Instance to restrain doxxing acts. In deciding whether the disclosure of personal data has

³ Please see LC Paper No. CB(4)1363/20-21(02).

caused harassment, molestation, pestering, threat or intimidation to the data subject and his/her family members, the Court may take into account the ordinary meanings of the above words in context and make reference to case law⁴ on the meaning of the words. Hence, there is no need to include interpretation of the aforesaid terms in the Bill.

29. A number of members have pointed out that some victims of doxxing cases have to move to a new place of residence or find a new school place as a result of the disclosure of personal data. Question has been raised as to whether such disclosure has caused specified harm to the victims. The Administration has advised that any harm causing the person to be reasonably concerned for the person's safety or well-being will be regarded as "specified harm".

News activities

30. The proposed amendment to section 64(4)(d)(i) of Cap. 486 provides that it would be a defence for the person charged to establish if the disclosure of personal data is solely for the purpose of a lawful news activity ("news activity" as defined under section 61(3) of Cap. 486). Concern has been raised as to how the Administration will differentiate between lawful and unlawful news activities.

31. The Commissioner has advised that the proposed amendment is made with reference to the wording used in the various injunction orders against doxxing acts made by the High Court in 2019. The defence in relation to the disclosure of personal data for the purpose of news activities provided for under section 64(4)(d) of Cap. 486 will remain unchanged.

Prosecution

32. The Bill proposes to replace the two-year time limit for laying of information in respect of an offence under Cap. 486 before a magistrate under the existing section 64B of Cap. 486 with a two-year time limit specifically for prosecution of a summary offence under Cap. 486. Noting that there is already a two-year time limit for prosecution of summary offences, members have enquired about the reasons for the amendment. Clarification has also been sought on "the date on which the offence is committed" in the proposed section 64B(1).

33. The Administration has advised that all offences under the existing Cap. 486 are summary offences. As indictable offences are introduced in the Bill, it is necessary to amend section 64B of Cap. 486 to specify that the two-year time limit is applicable only for prosecution of summary offences. For indictable offences,

⁴ Please see LC Paper No. CB(4)1434/20-21(01) for details of case law.

there is no such time limit for instituting prosecution under the common law. Regarding "the date on which the offence is committed", the Commissioner has advised that it is the date of disclosure of data, for instance, the date on which the discloser posted the doxxing contents on an online platform.

34. Question has been raised as to whether private prosecution can be pursued if SJ decides not to initiate a prosecution under the Bill. The Commissioner has advised that citizens' right of making private prosecution will not be affected.

The Privacy Commissioner for Personal Data's new investigative and enforcement powers

35. At present, PCPD lacks criminal investigative and prosecution powers in handling criminal cases under Cap. 486. Criminal investigations are conducted by the Police, and prosecutions, if required, are initiated by DoJ. Under the Bill, it is proposed that the Commissioner will have certain new investigative, enforcement and prosecution powers.

Powers to require materials and assistance

36. Under the proposed section 66D(2), the Commissioner may, by written notice given to a person, require the person to provide any document, information or thing ("the material") in the person's possession or control relevant to a specified investigation. Under the proposed section 66D(4)(b), it is proposed that the Commissioner may specify in the written notice given to the person the way and form in which the material under request is to be provided. Under the proposed section 66D(5)(b), if the material required to be provided by a person is stored electronically, the Commissioner will have the power to issue a written notice requiring the person to "give directions on the operation of the equipment containing the material; and to provide the appropriate system for reducing the material into a written form on paper". Members and the Legal Adviser to the Bills Committee raised queries as to whether the Commissioner will specify in a written notice the actions required to be taken by the person to comply with such notice.

37. The Administration has advised that to facilitate the person on whom the written notice is served to co-operate with the Commissioner's specified investigation, the Commissioner will specify in a written notice issued under the proposed section 66D(2) the actions required to be taken, including the specific form of providing the material.

38. The proposed section 66D(2)(c) stipulates that the Commissioner may, by written notice given to the person, require the person to answer any written question relating to a matter that the Commissioner reasonably believes to be relevant to the

specified investigation. There is concern that such written notice may alert the discloser to the possibility of being arrested and the discloser will quickly erase the doxing contents stored in an electronic device. The Commissioner has advised that the person who is required to answer the written question may not necessarily be the discloser. According to the proposed section 66D(1), a person may be required to answer written questions from the Commissioner if the Commissioner reasonably suspects that the person can assist the Commissioner in relation to a specified investigation.

39. Under the proposed section 66D(6)(a)(iii), the Commissioner will have the power to require the person, or another person whom the Commissioner reasonably believes is able to do so, to give an explanation of, or further particulars about, the material in question. Under the proposed section 66E(1), a person commits an offence if he/she fails to comply with a requirement of a notice given to him/her. The Legal Adviser to the Bills Committee has enquired whether the person being given the notice will be liable under the proposed section 66E(1) if another person (i.e. not the person being given the notice) fails to give an explanation of or further particulars about the material in question, and whether the failure of the other person to give an explanation of or further particulars about the material constitutes a reasonable excuse for failure to comply under the proposed section 66E(3).

40. According to the Administration, where another person (i.e. not the person originally being given the notice) is to be investigated, that person will be served with another notice and be treated as a separate case. In the situation where the other person fails to comply with the written notice, the person who originally provides the material will not incur legal liability under normal circumstances unless it can be proved that he/she is involved (e.g. deliberate fraud and misleading the Commissioner) in the aforesaid. It is an offence under the proposed section 66E(1) if the person on whom the written notice is served fails to comply with the Commissioner's request. If the other person mentioned above is indeed unable to give an explanation or further particulars, the proposed section 66E(3) has already provided a defence for this scenario.

41. Members note from the Administration that the Police will assist PCPD in investigation when necessary. There is a suggestion that a provision should be added in the Bill to enable the Police to exercise the powers of the Commissioner to require a person to provide materials, answer questions or give assistance for the purpose of a specified investigation stipulated under the proposed section 66D. The Administration has advised that powers granted to the Commissioner under the proposed section 66D of the Bill are broadly in line with the criminal investigation powers of the Police. Therefore, the Administration considers there is no need to further amend the proposed section 66D.

42. There is concern that the proposed section 66D as presently drafted may be too detailed. The Administration has advised that such detailed approach is not new in Hong Kong legislation. Other legislation such as the Securities and Futures Ordinance (Cap. 571), Competition Ordinance (Cap. 619), etc. adopted similar approach, that is, all investigative powers are set out to enable the law enforcement and prosecution parties to better understand the source of their authority. Since the materials required for the purpose of the specified investigation under the proposed section 66D may be in various forms, it is considered appropriate to set out all the possible means that can assist in collecting evidence related to the crime committed.

Powers exercisable in relation to premises and electronic devices

43. Some members are concerned that with the advancement of technology, relevant evidence can be destroyed quickly without trace. They have enquired whether the Commissioner will be given discretionary power to speed up the investigation process. The Commissioner has advised that for the purposes of collecting evidence and preventing destruction of evidence, the Commissioner will be empowered under the proposed section 66G(8) to access an electronic device, such as a mobile phone, without a warrant in urgent circumstances where it is not reasonably practicable to obtain warrant to access an electronic device.

44. Question has been raised over the application of the new section 66G(8) in case a suspect refuses to unlock his/her electronic device or applies for an injunction to restrict access to the device. The Administration has advised that the Commissioner will seize and retain the suspect's electronic device; and at the same time apply to the Court for a warrant to require provision of login name and password to the device.

45. There is concern as to how the privacy of a person can be safeguarded in the circumstances under which a power to access an electronic device is exercised. According to the Administration, the proposed section 66G(10) provides that in exercising the power to access an electronic device without a warrant pursuant to the proposed section 66G(8), the Commissioner or prescribed officer must have regard to the safeguards under the common law to protect the privacy of a person in the circumstances in which a power to access an electronic device is exercised.

46. The Legal Adviser to the Bills Committee has asked the Administration to clarify as to the safeguards under the common law referred to under the proposed section 66G(10). The Administration has advised that in *Sham Wing Kan v Commissioner of Police* [2020] 2 HKLRD 529, while the Court of Appeal pointed out the potentially high privacy interest of the digital contents stored in mobile devices, it also recognized the new challenges presented by the use of mobile phones as instruments of committing crime and therefore the legitimate need for law

enforcement officers to search such phones in appropriate circumstances with appropriate safeguards (e.g. to search, upon arrest and without warrant, the digital contents of a mobile phone found on an arrested person) in accordance with the following conditions:

- (a) when it is not reasonably practicable to obtain a warrant before a search is conducted, the police officer shall have reasonable grounds to support that the conduct of the search immediately is necessary for the following purposes:
 - (i) the investigation of the offence(s) for which the person was suspected to be involved, including the procurement and preservation of information or evidence connected with such offences; or
 - (ii) the protection of the safety of persons (including the victim(s) of the crime, members of the public in the vicinity, the arrested person and the police officers at the scene);
- (b) other than a cursory examination for filtering purpose, the scope of the detailed examination of the digital contents of the mobile phone should be limited to items relevant to the purposes set out above; and
- (c) as an additional safeguard, a police officer should make an adequate written record of the purpose and scope of the warrantless search as soon as reasonably practicable after the performance of the search and a copy of the written record should be supplied forthwith to the arrested person unless doing so would jeopardize the ongoing process of criminal investigation.

47. The Legal Adviser to the Bills Committee has enquired whether it is intended that persons other than public officers can exercise the powers conferred upon the Commissioner to enter and search premises, seize, remove and detain material found in premises, decrypt or search for any material stored in an electronic device, or make copies of or take extracts from the material and take away such copies or extracts under the authorization of a warrant (proposed section 66G(2) and (3)); and in particular, whether the power to access an electronic device without warrant under the proposed section 66G(8) can be exercised by persons other than public officers.

48. According to the Administration, the existing section 2 of Cap. 486 provides that a prescribed officer means a person employed or engaged under section 9(1), and section 9(1) provides that the Commissioner may employ such

persons (including technical and professional persons), and engage, other than by way of employment, such technical and professional persons as the Commissioner thinks fit to assist in the performance of the Commissioner's functions, and the exercise of the Commissioner's powers, under Cap. 486. The existing Cap. 486 does not define "prescribed officer" by reference to whether the person concerned is a public officer. Notwithstanding this, the Commissioner will enter into an employment or appointment relation with the "prescribed officer" before making the prescribed appointment to ensure the officer's continuity in giving evidence in courts in future prosecution proceedings and in seizure, removal and detention of exhibits or evidence. Moreover, a "prescribed officer" is required to observe the principle of confidentiality under the proposed section 66Q, i.e. to maintain secrecy in respect of any matters that come to the person's knowledge in exercising the criminal investigative powers, including but not limited to the power to access an electronic device without a warrant, otherwise the person commits an offence.

49. Members note that while "access" is not defined for the purposes of the proposed section 66G, the word is defined in relation to cessation action under the proposed section 66L. The Legal Adviser to the Bills Committee has enquired about the meaning of "access" under the proposed sections 66G(3) and (8) and whether it is necessary to define it clearly in the proposed section 66G, especially in relation to the proposed section 66G(8), under which it is proposed that a prescribed officer can "access" an electronic device without warrant.

50. According to the Administration, the term "access" is used in the proposed sections 66G and 66L but the contexts of the two provisions are entirely different. In the context of the proposed section 66G which deals with accessing an electronic device, "access" can be understood in its ordinary meaning, i.e. to inspect the contents of the device. For the proposed section 66G(3), the powers that may be exercised under warrant in relation to an electronic device include to access, seize and detain the device, and decrypt and search for certain materials stored in the device. Under the proposed section 66G(8), the power that may be exercised in relation to an electronic device, without warrant but under specified conditions, is confined to accessing the device only. Besides, the proposed section 66G(10) stipulates that regard must be had to the safeguards under the common law to protect privacy when accessing an electronic device without warrant.

51. The Administration has further advised that on the other hand, the proposed section 66L(3) clearly provides that the definition of "access" is applicable to the proposed section 66L only (i.e. the meaning of cessation action), including to cease or restrict access by any person to "subject message" or the relevant platform under the proposed section 66L(2)(b) which may include "access" involving different technologies. It is therefore necessary to give a technical definition to "access" in that provision to present a clear picture to the public of the technical

meanings of "access" in that specific circumstance.

Powers to stop, search and arrest persons

52. The Bill proposes that the Commissioner (or a person authorized by the Commissioner) can stop, search and arrest a person without a warrant. There are views that PCPD should consider providing enforcement protocols to safeguard the rights of the public. The Legal Adviser to the Bills Committee has enquired who may an "authorized officer" be, and whether in exercising the powers to stop, search and arrest, such authorized officer will have to show proof of authorization.

53. The Administration has advised that the power will only be exercised when the person is reasonably suspected to have committed certain offences under Cap. 486. Besides, an "authorized officer" will be issued with a warrant card or given a set of uniform where appropriate to prove his or her identity. Subject to the passage of the Bill, PCPD will issue relevant guidelines covering persons within the meaning of "authorized officer" and upload them onto PCPD's website for public information.

Protection of legal professional privilege

54. Members note that regarding the Commissioner's proposed powers to require materials and assistance under the proposed section 66D and to search premises and access electronic devices under the proposed section 66G, and to stop, search and arrest persons under the proposed section 66H, depending on the circumstances, the relevant materials may be protected by legal professional privilege and hence constitute a "reasonable excuse" as mentioned in the proposed sections 66E(3) or a "lawful excuse" as mentioned in the proposed section 66I. The Legal Adviser to the Bills Committee has enquired whether the Administration will consider adding an express provision on legal professional privilege. The Commissioner has advised that legal professional privilege is a right under the common law. As the principle of legal professional privilege can be applied to the proposed section 66I, DoJ considers it not necessary to add an express provision under the Bill.

Staffing of the Office of the Privacy Commissioner for Personal Data

55. Some members are concerned about the adequacy of PCPD's manpower resources to cope with the additional workload arising from the new investigative and prosecution powers conferred upon the Commissioner, while others are worried that PCPD's staff do not have the relevant experience and skills to undertake the new investigation and prosecution work. For example, PCPD's staff may not be able to handle the situation where the suspect resists an attempt to arrest. There is

also a suggestion that PCPD should recruit more information technology expert to tackle internet doxxing activities.

56. The Administration has advised that the additional demand for staff will be met by internal redeployment and PCPD has also requested additional resources according to the established mechanism. PCPD will consider employing qualified staff with expertise, such as experienced criminal lawyers and retired law enforcement personnel, to carry out investigation and prosecution work. Where necessary, PCPD may conduct joint operation with the Police. To enable PCPD's frontline staff to carry out investigation and enforcement work effectively, the Police has been invited to provide relevant training courses to PCPD staff.

Cooperation with the Police

57. Some members consider there is a need to set out clearly the division of work and delineation of responsibilities between the Police and PCPD over the handling of doxxing cases upon enactment of the Bill. The Commissioner has advised that PCPD is actively discussing the division of work with the Police, and will set up a coordination and cooperation mechanism with the Police upon passage of the Bill. In fact, the Commissioner will be empowered by the Bill to carry out criminal investigation and institute prosecution for certain summary offences in the Magistrates' Courts. Depending on the severity of the case, the Commissioner will decide whether to exercise the prosecution power in his/her own name; or refer more serious cases or cases involving suspected commission of other offences to the Police or DoJ for following up, such as cases relating to access to computer with criminal or dishonest intent, fraud and blackmail.

Proposed new power of the Privacy Commissioner for Personal Data to serve a cessation notice

58. The proposed cessation notice mechanism under the Bill aims at expeditiously removing doxxing messages in order to reduce or prevent any harm caused to the data subjects and their family members.

Extra-territorial effect

59. Some members have enquired whether the Bill will be effective in tackling doxxing made by persons not present in Hong Kong or made under pseudonyms. The Administration has advised that there is difficulty in carrying out investigation and enforcement if the discloser is outside Hong Kong. Nevertheless, the Commissioner can serve a cessation notice to demand the internet service provider to remove the doxxing contents in question with a view to minimizing the adverse impact to the data subject as well as the public at large.

60. There is also concern about the effectiveness of the Bill in requesting overseas social media platforms to remove web links containing doxxing contents. Some members have enquired whether the Commissioner has to apply to the Court for issuing a cessation notice and how PCPD will follow up if an overseas online platform fails to comply with the cessation notice.

61. The Commissioner has advised that the Bill seeks to confer on the Commissioner statutory powers to serve a written notice on a service provider outside Hong Kong (e.g. the operator of an overseas social media platform) directing the provider to take the cessation action, if the Commissioner has reasonable ground to believe that the provider is able to take a cessation action in relation to an electronic message. There will be no need for the Commissioner to apply to the Court in respect of the issue of the notice. Any person who contravenes a cessation notice will commit an offence and may be liable to imprisonment and fine unless a defence can be established. As most of the overseas online platforms have a policy that the contents of the platforms should comply with the requirements of local legislation, it is expected that most of the online platforms will comply with the cessation notice.

62. Noting that a cessation notice may be served on a person in Hong Kong or a service provider outside Hong Kong that is able to take the cessation action in relation to a subject message, members and the Legal Adviser to the Bills Committee have enquired whether the Administration will clearly define in the Bill the meaning of "is able to take a cessation action". Also, the proposed section 66O stipulates that if the person who receives the cessation notice fails to comply with the notice, that person commits an offence unless the person can establish a defence. Concern has been raised by members as well as the Legal Adviser to the Bills Committee as to whether the cessation notice will be served on an employee of the service provider and if so, the categories of such employees (such as officers or managers).

63. The Administration has advised that as far as electronic messages are concerned, the Commissioner will generally serve a cessation notice on the relevant individual or entity (such as the operator of an online platform operator) who is able to take cessation action; and a cessation notice will not be served on the individual employees of the Hong Kong subsidiary of a non-Hong Kong company if they are unable to take cessation action. In addition, any person served with the cessation notice or affected by the notice may lodge an appeal to the Administrative Appeals Board against the notice not later than 14 days after the notice is served. However, the appeal process will not affect the operation of the cessation notice.

64. As it takes time for the recipients of the cessation notice to comply with the requirements specified in the notice, there is a suggestion that instead of just

demanding the online platforms concerned to remove the doxxing contents, the Administration may consider blocking a website containing doxxing contents from being accessible in Hong Kong. The Administration has advised that it may be possible to request an internet service provider to block access to the website concerned from Hong Kong in extreme cases.

Defence and immunity

65. The proposed section 66O(2)(b)(iv) provides that it is a defence for a person charged with an offence under the proposed section 66O(1) in respect of a cessation notice to establish that it was not reasonable to expect the person to comply with the cessation notice because there was a risk of incurring a civil liability arising in contract, tort, equity or otherwise. There is concern that the proposed defence is too wide in scope, thereby undermining the Commissioner's power to issue, and capability to enforce, the cessation notice.

66. The Administration has advised that having examined other legislation in Hong Kong, a defence that is similar to the proposed section 66O(2)(b)(iv) cannot be found. On the contrary, there are immunity clauses for protecting persons from potential civil liability owed to third parties in complying with certain legal requirements imposed on them. Examples can be found in section 380 of the Securities and Futures Ordinance (Cap. 571) and section 54 of the Financial Reporting Council Ordinance (Cap. 588). To address members' concern, the Administration proposes deleting the proposed defence under the proposed section 66O(2)(b)(iv) and instead adding the following immunity clause (proposed new section 66OA) which will, in practice, ensure that the recipient of a cessation notice will be protected from potential civil liability arising from compliance with the cessation notice:

"A person who complies with a cessation notice served on the person does not incur any civil liability, whether arising in contract, tort, equity or otherwise, to another person only because of that compliance".

Service of a cessation notice out of jurisdiction

67. The Legal Adviser to the Bills Committee has enquired whether the Administration will consider making reference to Order 11 of the Rules of the High Court (Cap. 4A) in relation to service of process out of the jurisdiction when serving cessation notice on a person outside Hong Kong, and adding a provision on proof of service of cessation notices to avoid possible disputes. The Commissioner has advised that the service of a cessation notice is not the same as service of process. Section 68 of Cap. 486 covers the service of all notices required to be served under Cap. 486 including cessation notices. As regards Order 11 of the Rules of the High

Court, it regulates the service of legal documents for the purpose of civil proceedings. PCPD will abide by the rules as and when there are civil proceedings involved, as appropriate.

Public education and publicity

68. Some members are worried that the public may be caught by the new offences inadvertently. There are suggestions that the Administration and PCPD should, upon passage of the Bill, launch adequate publicity to raise public awareness and understanding, remind operators of relevant websites, online social media platforms or discussion forums that they should prevent their platforms from being abused as a tool for infringing personal data privacy, and appeal to netizens not to publish others' personal data which may violate Cap. 486 and constitute criminal offence.

69. Some other members opine that the number of cases relating to doxxing or bullying may be on a rise with the commencement of a new school year. They urge PCPD to step up its efforts to promote among children and youngsters the importance of protecting their personal data privacy and respecting the personal data privacy of others.

70. The Administration has taken note of members' suggestions and advised that PCPD has been making the effort to promote anti-doxxing messages to the general public. For example, a hotline has been set up to answer enquiries or complaints about doxxing behaviour.

Proposed amendments to the Bill

71. As mentioned in paragraph 66 above, the Administration proposes moving the amendments to the Bill in **Appendix II**, which is supported by members. No difficulties have been identified by the Legal Adviser to the Bills Committee in relation to the legal and drafting aspects of the proposed amendments. The Bills Committee will not propose any amendments in its name.

Resumption of the Second Reading debate

72. The Bills Committee supports the Administration to resume the Second Reading debate on the Bill at the Council meeting of 29 September 2021.

Advice sought

73. Members are invited to note the deliberations of the Bills Committee.

Council Business Division 4
Legislative Council Secretariat
9 September 2021

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

Membership list*

Chairman Hon Alice MAK Mei-kuen, BBS, JP

**Deputy
Chairman** Hon YUNG Hoi-yan, JP

Members Dr Hon Priscilla LEUNG Mei-fun, SBS, JP
Hon Mrs Regina IP LAU Suk-ye, GBM, GBS, JP
Hon Paul TSE Wai-chun, JP
Hon MA Fung-kwok, GBS, JP
Hon CHAN Han-pan, BBS, JP
Hon LEUNG Che-cheung, SBS, MH, JP
Hon KWOK Wai-keung, JP
Hon Christopher CHEUNG Wah-fung, SBS, JP
Hon Elizabeth QUAT, BBS, JP
Ir Dr Hon LO Wai-kwok, GBS, MH, JP
Hon CHUNG Kwok-pan
Dr Hon Junius HO Kwan-yiu, JP
Hon Holden CHOW Ho-ding
Hon SHIU Ka-fai, JP
Hon CHEUNG Kwok-kwan, JP
Hon LUK Chung-hung, JP

(Total : 18 Members)

Clerk Ms Angel WONG

Legal Adviser Miss Joyce CHAN

Date 26 August 2021

* Changes in membership are shown in Annex to Appendix I.

Annex to Appendix I

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

Changes in membership

Member	Relevant date
Dr Hon CHENG Chung-tai	Up to 25 August 2021

Personal Data (Privacy) (Amendment) Bill 2021

Committee Stage

Amendments to be moved by the Secretary for Constitutional and Mainland Affairs

<u>Clause</u>	<u>Amendment Proposed</u>
10	In the proposed section 66O(2)(b)(ii), by adding “or” after “person;”.
10	In the proposed section 66O(2)(b)(iii), by deleting “; or” and substituting a full stop.
10	By deleting the proposed section 66O(2)(b)(iv).
10	In the proposed Part 9A, in Division 4, by adding— “66OA. Immunity from civil liability A person who complies with a cessation notice served on the person does not incur any civil liability, whether arising in contract, tort, equity or otherwise, to another person only because of that compliance.”.