

For discussion

17 May 2021

Legislative Council Panel on Constitutional Affairs
Proposed amendments to the Personal Data (Privacy) Ordinance
(Cap. 486)

Purpose

This paper seeks Members' views on the proposed amendments to the Personal Data (Privacy) Ordinance (PDPO) to combat doxxing acts which intrude into personal data privacy.

Background

2. Doxxing acts, which are intrusive to personal data privacy and in effect weaponise personal data, have caused great harm to the victims in the society in recent years. The Government and the Office of the Privacy Commissioner for Personal Data (PCPD) are committed to combating doxxing acts. Between June 2019 and April 2021, the PCPD received and proactively uncovered over 5 700 doxxing-related complaints. It has also actively approached and written for over 297 times to concerned operators of 18 websites, online social media platforms or discussion forums, urging them to remove over 5 905 hyperlinks, of which 4 328 hyperlinks (about 70%) have been removed.

3. Between June 2019 and April 2021, the PCPD referred over 1 460 cases which involved suspected contravention of section 64(2) of the PDPO¹ to the Police for criminal investigation and consideration of prosecution. For those cases related to doxxing, a total of 17 suspects had been arrested by the Police for suspected contravention of section 64(2) of the PDPO, and two of the suspects had been convicted. In November 2020, one of the defendants was sentenced to imprisonment for 18 months for contravention of section 64(2) of the PDPO, with a total term of imprisonment of 2 years on combined convictions for other offences².

4. Moreover, between November 2019 and April 2021, the PCPD referred 60 doxxing cases on suspicion of breaching the court's injunction orders to the Department of Justice (DoJ) for follow up action. Among these cases, four defendants were convicted, and one of them was convicted in December 2020 of civil contempt of court for posting the personal data of a police officer and his family members on a social media platform. The defendant was sentenced to 21 days' immediate imprisonment³.

¹ Section 64(2) of the PDPO provides that a person commits an offence if (a) the person discloses any personal data of a data subject which was obtained from a data user without the data user's consent; and (b) the disclosure causes psychological harm to the data subject. A person who commits an offence under section 64(2) is liable on conviction to a fine of \$1,000,000 and to imprisonment for 5 years.

² [2020] HKDC 1020 (DCCC 164/2020, Date of Judgement: 3 November 2020). This is the first conviction for contravention of section 64(2) of the PDPO.

³ [2020] HKCFI 3147 (HCMP 744/2020, Date of Judgement: 28 December 2020). This is the first case in which a defendant is sentenced to immediate imprisonment for breaching a court's injunction order on doxxing.

5. Recent court judgments on doxxing cases have reflected the serious consequences caused by doxxing acts. In the above two cases in which the defendants were convicted of contempt of court for breaching an interim injunction order issued by the court, the Judge pointed out in the judgements that the effects of doxxing acts on the victims can be far wider and last for far longer, and that such acts cannot be tolerated in a civilised society⁴. In another case of a similar nature, the Judge also pointed out that the distant use of the Internet to perform doxxing acts has far-reaching consequences, causing real nuisance, real harassment and real anxiety to the society, the victims and their family members. Also, doxxing acts would create a chilling effect in the society and discourage open expression of views for fear of falling victim to doxxing⁵. The impacts of publishing biased contents in doxxing posts on the society is also a major consideration of the Judge in arriving at the judgements.

6. In this regard, members of the Legislative Council (LegCo) Panel on Constitutional Affairs urged the Government on a number of occasions to step up efforts in combating the acts of doxxing to protect personal data privacy, and expressed their support for curbing doxxing through amending the PDPO. At the LegCo's Question and Answer Session held on 4 February 2021, the Chief Executive said the Government would tackle the more imminent problem of doxxing which intruded into personal data privacy, with an aim to complete the drafting of the legislative amendment

⁴ [2020] HKCFI 3147 (HCMP 744/2020, Date of Judgement: 28 December 2020), see paragraphs 46 and 47 of the Judgement; and [2020] HKCFI 3148 (HCMP 1068/2020, Date of Judgement: 29 December 2020), see paragraphs 44 and 45 of the Judgement.

⁵ [2020] HKCFI 1194 (HCMP 249/2020, Date of Judgement: 17 June 2020), see paragraphs 34, 76 and 77 of the Judgement.

proposals related to doxxing and submit a Bill for the scrutiny of the LegCo within this legislative year.

Proposed amendments to the PDPO

7. Although the Government and the PCPD have made active efforts in carrying out enforcements under the PDPO, the current PDPO regulates “data user⁶” and section 64 was not intended to address the doxxing acts committed in recent years. Sections 64(1) and (2) of the current PDPO currently provide that:

“(1) A person commits an offence if the person discloses any personal data of a data subject which was obtained from a data user without the data user’s consent, with an intent—

(a) to obtain gain in money or other property, whether for the benefit of the person or another person; or

(b) to cause loss in money or other property to the data subject.

(2) A person commits an offence if—

*(a) the person discloses any personal data of a data subject which was obtained from a data user without the data user’s consent;
and*

⁶ A data user is defined as a person who, either alone or jointly or in common with other persons, controls the collection, holding, processing or use of the data.

(b) the disclosure causes psychological harm to the data subject.”

8. One of the conviction thresholds of the above provisions is “without the data user’s consent”, covering circumstances such as improper disclosure of the medical record of a data subject⁷ without the consent of the hospital as a data user. At present, the personal data involved in most doxxing cases was recklessly dispensed and repeatedly reposted on online platforms, making it impossible for the PCPD to trace the sources of the doxxing contents and ascertain the identity of the data users concerned or whether the personal data concerned was obtained from the data user “without the data user’s consent”. Therefore, the PCPD is unable to take further follow-up actions under the existing section 64 of the PDPO.

9. Besides, while the PCPD has currently requested the online platforms to remove web links related to doxxing contents and individual online platforms have complied with PCPD’s requests, such requests were not mandatory from the legal perspective. In this regard, we propose to amend the PDPO to specifically combat doxxing acts. The proposed amendments are set out in the paragraphs below.

(I) Add an offence to curb doxxing acts

10. We propose that an offence should be introduced under section 64 of the PDPO to curb doxxing acts. The scope of the proposed provision is set out below:

⁷ A data subject is defined as the individual who is the subject of the data.

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;

and the disclosure causes psychological harm to the data subject or any immediate family member.

11. The relevant new doxxing provisions not only protect the data subject, but also offer protection to his/her immediate family members⁸. To reflect the severity of doxxing cases, we propose any person who contravenes the doxxing offence is liable on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 5 years, or on summary conviction to a fine of \$100,000 and to imprisonment for 2 years. The penalty of existing offence under section 64 will tally with the new doxxing provisions.

⁸ Immediate family member means another person who is related to the person by blood, marriage, adoption or affinity. This definition is the same as that under section 63C of the PDPO.

(II) Empower the Commissioner to carry out criminal investigation and prosecution

12. When handling doxxing cases, the PCPD is required to refer cases to the Police and the DoJ for criminal investigation and consideration of prosecution if there are reasonable grounds to believe that such cases contravene section 64(2) of the PDPO. To step up enforcement against the doxxing offence, we propose to add new provisions to empower the Privacy Commissioner for Personal Data (the Commissioner) to carry out criminal investigation and initiate prosecution under section 64 of the PDPO (including the new doxxing offence proposed in paragraph 10 above)⁹.

13. On criminal investigation power, we propose that the Commissioner could request relevant information, documents or things from any person, or require any person to answer relevant questions to facilitate investigation when the Commissioner has reasonable grounds to believe that a contravention of section 64 of the PDPO (including the new doxxing offence proposed in paragraph 10 above) has been, or is being, committed¹⁰. 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

⁹ Generally speaking, the PCPD would not be able to ascertain which limb of section 64 applies in prosecution before the investigation is completed. Therefore, the PCPD should exercise its proposed power to carry out criminal investigation and initiate prosecution on the basis that a contravention of section 64 of the PDPO (instead of only the new doxxing offence proposed in paragraph 10 above) has been, or is being, committed.

¹⁰ The proposed powers are similar to those conferred to the Commissioner under the existing sections 43 and 44 of the PDPO to carry out investigation in accordance with Part 7 of the PDPO.

information, documents or things that are false or misleading. In fact, conferred with the responsibility of enforcing the PDPO, the Commissioner possesses the expertise in the protection of personal data privacy in accordance with the law. Conferring the Commissioner with additional criminal investigation power can effectively expedite the processing of doxxing cases.

14. Moreover, to enable the Commissioner to investigate doxxing cases more effectively, we consider that the power of the Commissioner or any prescribed officer to apply for the court's permission for entry into any premises under the existing section 42 of the PDPO should also apply to the doxxing offence. Besides, to allow the more effective collection of evidence for prosecution, we propose that the power should cover seizure of documents or things after entry into the premises. When applying for a warrant, the Commissioner should have reasonable grounds to believe that a contravention of section 64 of the PDPO has been, or is being, committed, and with reasonable grounds to suspect that there are at the premises documents or things that can be collected as evidence for prosecution proceedings.

15. On the power to initiate prosecution, we propose that legislative amendments be made to empower the Commissioner to prosecute in its own name for cases of suspected contravention of section 64 of the PDPO or failure to comply with the Commissioner's requests related to criminal investigation mentioned above. Such offences should be triable summarily in the Magistrates' Courts. Depending on the severity of the cases, the Commissioner will decide whether to exercise the prosecution

power in its own name, or refer the more serious cases or cases involving suspected contravention of other offences to the Police or the DoJ for follow up actions. The above proposal can enhance the PCPD's powers in criminal investigation, collection of evidence and prosecution, without the need to refer the cases to the Police or the DoJ, and this would help expedite the handling of doxxing cases.

(III) Confer on the Commissioner statutory powers to demand the rectification of doxxing contents

16. With the advancement of technology, doxxing contents can be spread and reposted in a click, causing harm to the data subjects or their immediate family members. It is therefore necessary to remove the information unlawfully disclosed in an expeditious manner. We suggest adding provisions to empower the Commissioner to serve a Rectification Notice to any person for rectification actions, when it has reasonable grounds to believe that a contravention of section 64 of the PDPO has been, or is being committed, and within a designated timeframe¹¹ to reflect the urgency of doxxing cases. As there are no geographical constraints in the Internet, we propose the Commissioner can serve a Rectification Notice to any person who provides services in Hong Kong to Hong Kong residents, so as to direct the relevant online platform to rectify the doxxing content.

¹¹ A Rectification Notice requires the person concerned to take rectification actions within the designated timeframe, for example removing the doxxing message before the deadline. This has taken reference to the mechanism of Enforcement Notice under section 50 of the PDPO.

The Commissioner will specify in the Rectification Notice the concerned doxxing content, notify the person what rectification actions to take, as well as the deadline for complying with the Rectification Notice, etc. If the person who receives the Rectification notice cannot comply with the notice within the designated timeframe, that person can put up a defence to prove he/she has a reasonable excuse of not following the Rectification Notice in a timely manner, otherwise that person commits an offence¹².

17. For Rectification Notice, we also propose to set up an appeal mechanism, i.e. an appeal may be made to the Administrative Appeals Board (AAB) against a Rectification Notice by any person affected by the notice not later than 14 days after the notice was served¹³. That said, to contain the harm caused to the data subjects or their immediate family members, any person being served with the Rectification Notice should first comply with the notice within the designated timeframe pending AAB's final decision. If no contravention is found after investigation, the Commissioner may cancel the Rectification Notice by notice in writing.

18. Besides, as there have been doxxing acts targeting specific persons or groups in the society, we propose to add new provisions to

¹² It is an offence to contravene a Rectification Notice, and we propose to model on the penalties of the Enforcement Notice under section 50A of the PDPO, that is (a) on a first conviction (i) to a fine at level 5 and to imprisonment for two years; and (ii) if the offence continues after the conviction, to a daily penalty of \$1,000; and on a second or subsequent conviction (i) to a fine at level 6 and to imprisonment for two years; and (ii) if the offence continues after the conviction, to a daily penalty of \$2,000.

¹³ The appeal mechanism of Rectification Notice is similar to the appeal mechanism against the Commissioner's Enforcement Notice under the existing section 50 of the PDPO.

empower the Commissioner to apply to court for an injunction if he/she is satisfied that there is or it is very likely that there is large-scaled or repeated contraventions of section 64 of the PDPO in the society. Such injunction is an act of precaution to prevent the recurrence of doxxing incidents targeted at specific persons or groups.

19. The existing section 46 of the PDPO provides that the Commissioner and every prescribed officer shall maintain secrecy in the process of handling complaints or discharging general investigative functions. This principle should also apply to the proposed doxxing offence, i.e. the Commissioner and prescribed officers should maintain secrecy in respect of all matters that come to their actual knowledge in the exercise of their criminal investigation powers or in application of an injunction or issuance of the Rectification Notice.

Advice sought and the way forward

20. Members are invited to note the content of this paper and offer views on the above proposals. We are closely cooperating with the DoJ on the drafting work of the Amendment Bill, with an aim to finish drafting and submit the Bill in relation to doxxing acts to the LegCo within this legislative year.

Constitutional and Mainland Affairs Bureau

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