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27 October 2008

The Chairman
The Review of Sexual Offences Sub-committee
The Law Reform Commission
20/F, Harcourt House
39 Gloucester Road
Wanchai
Hong Kong

(Attn: Mr. Peter Duncan, SC)

Dear Mr. Duncan,

Consultation Paper on Interim Proposals on a Sex Offender Register

I refer to the captioned Paper issued on 29 July 2008 and the interim administrative proposals for the setting up of a sex offender register.

Overall comments

2. I agree that the introduction of a sex offender register can serve the public interest to protect children and mentally incapacitated persons from the possible or potential harm of those who had specific sex offence convictions. This has been borne out by overseas experiences and practices. However, a living individual's past conviction record is his "personal data" and is protected under the Personal Data (Privacy) Ordinance ("the Ordinance"). A data user who handles and use such data shall therefore have to comply with the requirements of the Ordinance. My concern therefore is that the establishment and the administration of the register do not contravene the requirements of the Ordinance.

3. Of particular relevance is the Data Protection Principle ("DPP") 3 in the Ordinance which provides that personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than for which the data were to be used at the time of the collection or a purpose directly related to the former purpose. The term "use" is defined to include the *transfer* and *disclosure* of the personal data. In the matter under consideration, the making available of sex offence records to prospective employers through the means of

a sex offender register does not appear to fall within the original purpose of collection of such criminal records or its directly related purpose. The intrusion into the data subject's personal data privacy will also be aggravated if such a register is to be made publicly accessible.

4. The Consultation Paper proposes the following privacy safeguards, i.e. (i) that the administrative scheme shall operate on a consensual basis, i.e. that the consent of the data subject is required; (ii) that the list of sexual offence will be specified (as listed out in para 4.34 of the Consultation Paper); (iii) that the persons who are allowed access are restricted to a defined class of prospective employer; and (iv) that the job sought by the data subject is child-related work or mentally incapacitated person-related work.

5. While I support these safeguards in principle, I have the following privacy concerns associated with the proposed administrative scheme.

The “prescribed consent” of the data subject

6. A prescribed consent given by the data subject should be expressly and voluntarily given. However, in a prospective employer-employee relationship there might exist a disparity of bargaining power. It is therefore difficult to be sure that the consent is genuinely voluntary in view of the fact that the data subject will know that if he is to be considered for the job he has no option but to give his consent.

7. If this option is ultimately preferred, then I consider it imperative that the data subject is fully informed of the nature of the job, the reasons why it is necessary for his prospective employer to know whether he has previously been convicted of a sexual offence and the privacy consequence of giving or withholding his consent for the release of any such personal data.

8. Naturally, a job applicant is reluctant or unlikely to give consent to his prospective employer to access such data if he has a past sex offence conviction. The present proposal, if implemented, will in fact have a “screening out” effect.

The proper management of the register by the police

9. In administering the sex offence register by the police, sufficient personal data privacy safeguards must be put in place to address issues such as (i) the amount of personal data to be disclosed; (ii) the specific purpose of disclosure; and (iii) the accuracy and retention period of the records on the register.

10. In relation to (i), a data user must ensure that only necessary, adequate but not excessive personal data are disclosed. Therefore, while the interim

administrative measures seek to include only certain specified classes of sexual offences, the details of the relevant information to be disclosed to the prospective employer should be carefully assessed and considered, e.g. whether the full circumstances of the offence and the sentence(s) passed should also be disclosed? There should also be regular reviews of the list of offences to be included, to ascertain that the offences covered are indeed necessary for the intended purpose.

11. As for (ii), it is important that the purpose for the use of the data be clearly spelt out to the prospective employer. The prospective employer should be made fully aware of the limited purpose of access so that the sensitive personal data so obtained are not used for other unrelated purposes.

12. In respect of (iii), it is incumbent upon the police to ensure that the records kept in the register are accurate and any data found to be inaccurate must be rectified as soon as practicable. For instance, where conviction is spent or quashed on appeal, the records should be updated and deleted where appropriate. Due consideration should also be given as to how far back in time such sex offence be included in the register and disclosed to the prospective employer. A proper balance has to be struck between public interest to protect the vulnerable persons and the personal data privacy of the data subjects.

13. Since the data to be collected are highly sensitive, I suggest the current data security measures adopted by the Police's Criminal Conviction Data Office (CCDO) be reviewed to upgrade the level of data security. The Police may consider undertaking a full Privacy Impact Assessment to ensure its privacy protection will be up to task. The government is advised to consider the setting up of an oversight body to keep the Police accountable and to undertake a post-implementation assessment of the scheme.

The proper use and management of the data by prospective employers

14. The sex offence records collected by prospective employers should not be kept longer than necessary. The purpose of collection of the past sex offence records should be fulfilled upon the decision by the prospective employer on whether to offer the job to the data subject. If no offer is to be made consequent upon the result obtained, the prospective employer should, in compliant with DPP2 (2) and section 26 of the Ordinance, erase such data.

15. Given the wide definition intended to be given to the term "employer" under the proposal to cover and include supervisors of volunteers and "*parents engaging the service of self-employed tutors*", I am concerned about the adequacy of the privacy measures and the privacy awareness and capability of the individual data users to protect the sensitive personal data against improper uses. This may create potential privacy situations that warrant careful consideration.

Legislation serves better privacy safeguards

16. From the perspective of personal data privacy protection and in view of the sensitive nature of the sex offence records, the interim administrative measure proposed in the Consultation Paper should not be perceived as the ultimate panacea. Consideration should be given for the sex offender register to be statutorily regulated so that the circumstances of disclosure, the purpose of disclosure and the proper access and management of the database are clearly defined by law. Sanctions may also be imposed on improper access or wrongful use of the data so obtained which can serve as effective deterrence and better privacy safeguard. In Canada, for example, unauthorised use or disclosure of the information collected from the sex offender register constitutes an offence.

17. I hope that due consideration will be given to the above comments. Should clarification be required you may contact our Policy Advisor, Mr. Aldan Kwok at 2877 7133.

Yours sincerely,

(Roderick B. WOO)
Privacy Commissioner for Personal Data