

The Law Society of Hong Kong

Personal Data (Privacy) (Amendment) Ordinance 2021 – Criminalisation of Doxxing Acts

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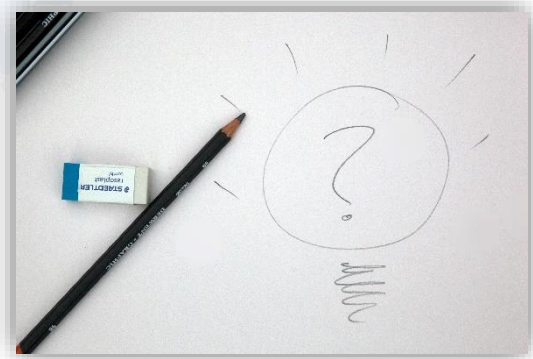
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Background of Amending the Personal Data (Privacy) Ordinance (Cap. 486) (“Ordinance”)



Harms caused by Doxxing

- PCPD handled over 6,000 doxxing cases in the past two years
- **Weaponisation** of personal data
- **Serious** and **far-reaching** harms caused to victims and their family members



Purview of the Personal Data (Privacy) (Amendment) Ordinance 2021 ("Amendment Ordinance")

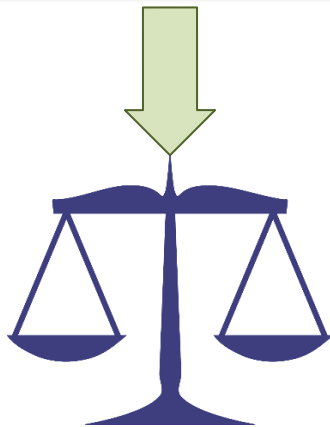


Three main objects of the Amendment Ordinance

1. Create offences to curb doxxing acts

2. Empower the Commissioner to carry out criminal investigations and institute prosecutions

3. Confer on the Commissioner powers to issue cessation notices



Commencement date of the Amendment Ordinance

8 October 2021:

The Amendment Ordinance was published in the Gazette and became effective immediately.



Newly added and Amended Provisions of the Amendment Ordinance



(I) Section 64 – Create offences to curb Doxxing Acts

Two-tier

New section 64(3A) of the Ordinance – first-tier offence (without actual harm)

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.

New section 64(3B) of the Ordinance – Penalty

(3B) A person who commits an offence under subsection (3A) is liable on conviction to a fine at level 6 (\$100,000) and to imprisonment for 2 years.

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(I) Section 64 – Create offences to curb Doxxing Acts

Two-tier

New section 64(3C) of the Ordinance – second-tier offence (with actual harm)

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; and
- (b) the disclosure causes any specified harm to the data subject or any family member of the data subject.

New section 64(3D) of the Ordinance – Penalty

(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.

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(I) Section 64 – Create offences to curb Doxxing Acts

	First-tier - Summary Offence	Second-tier – Indictable Offence
1.	Any personal data of a data subject is disclosed without the relevant consent of the <u>data subject</u>	
2.	Has an <u>intent</u> or is being <u>reckless</u> 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	
3.	N/A	The <u>disclosure causes any specified harm</u> to the data subject or any family member of the data subject

To determine the severity of the offence, the two-tier offence is differentiated by *whether actual harm has been caused to the data subjects or their family members.*

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(I) Section 64 – Create offences to curb Doxxing Acts

**Specified harm,
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

(new section 64(6) of the Ordinance)



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(I) Section 64 – Create offences to curb Doxxing Acts

Example

(a) Harassment, molestation or pestering to the person

- A complainant alleged that his and his family members' personal data were disclosed by netizens extensively; and as a result, he received over hundreds of nuisance calls and messages. His personal data was also misused for loan application and he received calls from financial institutions.



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(I) Section 64 – Create offences to curb Doxxing Acts

Example



(b) Bodily harm or psychological harm to the person

- Doxers disclosed the personal data of the complainant’s children online. They also suggested various methods to **bully and boycott** the complainant’s children at school, including picking up his children from school with a gunny sack. The complainant suffered from psychological harm as a result.
- Expert evidence will generally be required to prove “psychological harm”.

Objectives of the Amendment Ordinance

- to **criminalise** doxxing acts and more **effectively combat** the crime by **increasing the enforcement powers** of the Commissioner;

The Amendment Ordinance will not affect:

- **normal and lawful business activities** in Hong Kong;
- **freedom of speech** and **free flow of information** currently enjoyed by the public (as enshrined in the Basic Law and the Hong Kong Bill of Rights Ordinance).

(II) The Commissioner's powers to carry out criminal investigations and institute prosecutions

Issue written notice to request any person to provide relevant materials; or to answer relevant questions to facilitate investigation
(new section 66D of the Ordinance)

Apply for warrant to enter and search premises and seize materials for investigation; or access electronic device
(new section 66G of the Ordinance)



The Commissioner may

Prosecute in the name of the Commissioner a doxxing-related offence triable summarily in the Magistrates' Court
(new section 64C of the Ordinance)

To stop, search and arrest any person who is reasonably suspected of having committed a doxxing-related offence
(new section 66H of the Ordinance)

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(II) The Commissioner's powers to carry out criminal investigations and institute prosecutions



Powers to require materials and assistance (New section 66D of the Ordinance)

If the Commissioner reasonably suspects that, in relation to a **specified investigation**, a person –

- has or may have possession or control of any material relevant to that investigation;
- or
- may otherwise be able to assist the Commissioner in relation to that investigation

The Commissioner may, by **written notice** given to the person, require the person to **provide materials and assistance**.

Material: document, information or thing (new section 66C of the Ordinance)

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(II) The Commissioner's powers to carry out criminal investigations and institute prosecutions

Powers to require materials and assistance (New section 66D of the Ordinance)

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

- provide any **material** in the person's possession or control;
- **attend** before the Commissioner at a specified time and place and answer any question;
- **answer** any written question;
- make a **statement**; or
- give the Commissioner all the **reasonable assistance**, relating to a matter that the Commissioner reasonably believes to be relevant to the specified investigation.

(II) The Commissioner's powers to carry out criminal investigations and institute prosecutions

Powers to require materials and assistance (New section 66D of the Ordinance)

Failing to comply with a written notice is an offence.
(new section 66E(2) of the Ordinance)



On summary conviction
a fine at level 5 (\$50,000) and imprisonment for 6 months

On conviction on indictment
a fine of \$200,000 and imprisonment for 1 year

(II) The Commissioner's powers to carry out criminal investigations and institute prosecutions

Powers to require materials and assistance (New section 66D of the Ordinance)

It is an offence where, with intent to defraud:

- (i) a person fails to comply with a written notice issued pursuant to section 66D; or
 - (ii) a person provides any answer or statement that is false or misleading in a material particular
- (new section 66E(6) of the Ordinance)



On summary conviction

- a fine at level 6 (\$100,000) and imprisonment for 6 months

On conviction on indictment

- a fine of \$1,000,000 and imprisonment for 2 years

(II) The Commissioner's powers to carry out criminal investigations and institute prosecutions

Powers exercisable in relation to premises under warrant
(New section 66G(2) of the Ordinance)

To carry out specified investigation in the premises; and

To enter and search the premises;



To seize, remove and detain any material in the premises that the Commissioner or any prescribed officer reasonably suspects to be or to contain evidence for the purposes of the specified investigation

Under no circumstances shall the Commissioner or prescribed officers enter and search premises without a warrant.

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(II) The Commissioner's powers to carry out criminal investigations and institute prosecutions

Powers exercisable in relation to electronic device under warrant (New section 66G(3) of the Ordinance)



- (a) To access the device;
- (b) To seize and detain the device;
- (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);
- (e) To reproduce the relevant material in visible and legible form;
- (f) To reduce the relevant material into a written form on paper; and
- (g) To make copies of, or take extracts from, the relevant material and take away such copies or extracts.

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(II) The Commissioner's powers to carry out criminal investigations and institute prosecutions

Under what circumstances can powers be exercised in relation to electronic device without a warrant (New section 66G(8) of the Ordinance)

If the Commissioner or any prescribed officer reasonably suspects that

(i) A doxxing or a related offence (i.e. under section 64(1), (3A) or (3C), 66E(1) or (5), 66(I)1 or 66O(1)) has been, is being or is about to be committed;

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

(iii) a delay caused by an application for a warrant is likely to defeat the purpose of accessing the device, or for any reason it is not reasonably practicable to make the application.

Reflects similar common law powers of the Police.

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(II) The Commissioner's powers to carry out criminal investigations and institute prosecutions

A person who, without lawful excuse, **obstructs, hinders or resists** any officer in exercising the powers under section 66G or 66H, commits an offence
(new section 66I of the Ordinance)



On conviction

a fine at level 3 (\$10,000)
and imprisonment for 6 months

(II) The Commissioner's powers to carry out criminal investigations and institute prosecutions

The criminal investigation powers of the Commissioner under the Amendment Ordinance **reflects** the **powers of police officers** under the Police Force Ordinance (Cap. 232).



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(II) The Commissioner's powers to carry out criminal investigations and institute prosecutions

Prosecution of offences by the Commissioner (New section 64C of the Ordinance)

- (1) The Commissioner may prosecute **in the name of the Commissioner**—
 - (a) an offence under section 64(1) or (3A), 66E(1) or (5), 66I(1) or 66O(1); or
 - (b) an offence of conspiracy to commit such an offence.

- (2) Any offence prosecuted under subsection (1) must be tried before a **magistrate** as an offence that is **triable summarily**.

(III) Confer on the Commissioner power to issue cessation notices

Under what circumstances can the Commissioner serve a cessation notice
(New sections 66K and 66M of the Ordinance)

the message in question is a “subject message”

1. Personal data of a data subject was disclosed (whether or not in Hong Kong) without the consent of the data subject by means of a written message or electronic message

2. the discloser had an intent or was 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

3. When the disclosure was made, the data subject was a Hong Kong resident; or was present in Hong Kong

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(III) Confer on the Commissioner power to issue cessation notices

Under what circumstances can the Commissioner serve a cessation notice (New sections 66K and 66M of the Ordinance)

- When the Commissioner has reasonable ground to believe that there is a **“subject message”**, the Commissioner may serve a cessation notice on a person who is **able** to take a cessation action.

For electronic message

Hong Kong Person

- (a) an individual who is present in Hong Kong ;
- (b) a body of persons that is incorporated, established or registered in Hong Kong; or
- (c) a body of persons that has a place of business in Hong Kong

Non-Hong Kong service provider

A person (not being a Hong Kong Person) that **has provided or is providing any service** (whether or not in Hong Kong) **to any Hong Kong person**

Cessation notice has **extra-territorial application.**

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(III) Confer on the Commissioner power to issue cessation notices

Under what circumstances can the Commissioner serve a cessation notice
(New sections 66K and 66M of the Ordinance)

A cessation notice may be served to the following persons :

Hong Kong Person

- an individual in Hong Kong;
- an internet service provider having a place of business in Hong Kong;

Non-Hong Kong service provider (limited to electronic messages)

- an operator of an overseas social media platform

(III) Confer on the Commissioner power to issue cessation notices

Cessation Action (New section 66L of the Ordinance)

(a) **Remove** the message from the electronic platform on which the message is published (relevant platform)

(b) **Cease or restrict** access by any person to –

- (i) the message via the relevant platform;
- (ii) the part of the relevant platform on which the message is published;
- (iii) the whole of the relevant platform

(c) **Discontinue** the hosting service for –

- (i) the part of the relevant platform on which the message is published; or
- (ii) the whole of the relevant platform

(III) Confer on the Commissioner power to issue cessation notices

Offence for contravening a cessation notice (New Section 66O(1) of the Ordinance)

On first conviction

- a fine at level 5 (\$50,000) and imprisonment for 2 years, and in the case of a continuing offence, a further fine of HK\$1,000 for every day during which the offence continues

On each subsequent conviction

- a fine at level 6 (HK\$100,000) and imprisonment for 2 years; and in the case of a continuing offence, a further fine of HK\$2,000 for every day during which the offence continues

(III) Confer on the Commissioner power to issue cessation notices

Appeal against cessation notice

(New section 66N of the Ordinance)

Deadline for lodging
an appeal:

- Within 14 days after the date on which a cessation notice is served

To whom the appeal
is lodged:

- Administrative Appeals Board

Lodging an appeal does not affect the operation of the cessation notice.

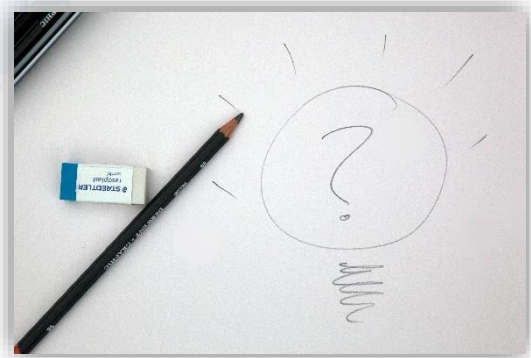
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(IV) Injunction (New section 66Q of the Ordinance)

The Commissioner may apply to the Court of First Instance for an **injunction**.

The Court may grant an injunction in any terms that the Court considers appropriate, if it is satisfied that a person (or any person falling within a category or description of persons) **has engaged, is engaging or is likely to engage**, in doxing offence.

Regulatory Framework of Other Jurisdictions



Australia

Online Safety Act 2021

Provisions governing cyber-bullying materials

- Enacted in June 2021, the [Online Safety Act 2021](#) retained certain provisions in the [Enhancing Online Safety Act 2015](#) and added new provisions for improving online safety for Australians generally, while retaining the protection of Australian children.
- A complaints and objections system is administered under the Act for :
 - Cyber-bullying material targeted at an **Australian child** (section 30 of the Act) (*retained*);
 - Non-consensual posting of **intimate images** (section 32 of the Act) (*retained*); and
 - Cyber-bullying material targeted at an **Australian adult** (section 36 of the Act) (*newly inserted*).
- Non-consensual posting of intimate image of an individual can be subject to a civil penalty of 500 penalty units, i.e. AUD110,000 (approx. HK\$660,000).

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Australia

Online Safety Act 2021

Removal Notice issued by the eSafety Commissioner

A removal notice may be issued when the online contents involve:

- Cyber-bullying material targeted at an Australian child (sections 65 and 66 of the Act);
- Non-consensual posting of intimate images (sections 77-79 of the Act);
- Cyber-bullying material targeted at an Australian adult (sections 88-90 of the Act).

Target of the removal notice

- Providers of social media service;
 - Providers of designated internet service; and
 - End-users of social media service.
-
- Non-compliance of removal notice can be subject to civil penalty of 500 penalty units, i.e. AUD110,000 (approx. HK\$660,000).

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New Zealand

Harmful Digital Communications Act 2015

Offences for causing harm by posting digital communication

- A person commits an **offence** if :
 - a) the person posts a digital communication with the **intention that it causes harm** to a victim;
 - b) posting the communication would **cause harm to an ordinary reasonable person** in the position of the victim; **and**
 - c) posting the communications **causes harm to the victim.**(section 22(1) of the Act)

Criminal Penalty

- Natural person: a fine of NZD50,000 (around HK\$258,000) and imprisonment for 2 years.
- Body corporate: a fine of NZD200,000 (around HK\$1,033,000).

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New Zealand

Harmful Digital Communications Act 2015

Court orders to remove harmful material

- The Court may make an order against an online content host to take down or disable the harmful material (section 19 of the Act)

The Court will consider an array of factors in assessing whether the material would cause harm to an individual, such as :

- extremity of the language used;
- context in which the material appeared;
- age and characteristics of the victim; or
- the extent in which the digital communication appeared.

(section 22(2) of the Act)

Singapore

Protection from Harassment Act

Offences for publishing others' identity information

It is an offence to publish identity information :

- with an intent to cause **harassment, alarm or distress** to the target person and, as a result, causing **harassment, alarm or distress** to the target person (section 3(1) of the Act); or
- with an intent to cause the target person to believe that **unlawful violence** will be used against him/ her (section 5(1A) of the Act).

Criminal Penalty

- a maximum fine of SGD5,000 (around HK\$28,700) and/ or imprisonment of up to 12 months.

Singapore

Protection from Harassment Act

Protection Order to remove offending material

Stop publication order (section 15A of the Act)

- Target: any individual or entity
- To **stop publishing** the relevant statement, and not to publish any substantially similar statement, by a specified time

Disabling order (section 15C of the Act)

- Target: an internet intermediary
- To **disable access** by end-users of the internet intermediary service provided in Singapore within a specified time

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Thank You!

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