

**Submission of the Privacy Commissioner for Personal Data  
in response to the Consultation Paper on  
Sentencing and Related Matters in the Review of Sexual Offences**

This submission is made by the Privacy Commissioner for Personal Data (“Privacy Commissioner”) in response to the *Consultation Paper on Sentencing and Related Matters in the Review of Sexual Offences* (“Consultation Paper”) published by the Review of Sexual Offences Sub-committee of the Law Reform Commission in November 2020.

***Legislation providing for penalties***

2. In the Consultation Paper, it is given as an argument for making the present Sexual Conviction Record Check Scheme (“SCRC Scheme”) a legislative scheme that –

“Compliance is better ensured than in an administrative scheme since penalties for non-compliance can be provided by legislation”<sup>1</sup>.

3. In this connection we would point out that, insofar as contraventions of personal privacy rights are concerned, sanctions are presently available under the Personal Data (Privacy) Ordinance, Cap. 486 (“PD(P)O”).

4. Where a person has acted in contravention of a requirement under the PD(P)O, the person whose privacy right has been infringed may make a complaint to the Privacy Commissioner<sup>2</sup>. The Privacy Commissioner may carry out an

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<sup>1</sup> The first point under paragraph 3.8 of the Consultation Paper.

<sup>2</sup> Section 37 of the PD(P)O.

investigation<sup>3</sup>. If it is found after investigation that there is contravention of the PD(P)O, the Privacy Commissioner may issue an enforcement notice directing the wrongdoer to remedy and, if appropriate, prevent any recurrence of the contravention<sup>4</sup>. Failure to comply with an enforcement notice is an offence, and the offender is liable to a fine at level 5 and imprisonment for 2 years<sup>5</sup>.

5. The sanctioning mechanism described above would deal with possible abuse of the SCRC Scheme in circumstances such as the following: -

- (a) The employer obtaining or using the ex-offender's conviction record for purposes other than assessing his suitability for work relating to children or persons with mental impairment;<sup>6</sup>
- (b) The employer passing on the ex-offender's conviction record to another party;<sup>7</sup>
- (c) The employer keeping the ex-offender's conviction record carelessly, causing it to be accessible by another person;<sup>8</sup>

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<sup>3</sup> Section 38 of the PD(P)O.

<sup>4</sup> Section 50(1) of the PD(P)O.

<sup>5</sup> Section 50A(1) of the PD(P)O.

<sup>6</sup> Such act would contravene Data Protection Principles ("DPP") set out in Schedule 1 to the PD(P)O, namely DPP1(1) (personal data shall not be collected unless for a lawful purpose directly related a function or activity of the data user) and DPP3 (personal data shall not, without the prescribed consent of the data subject, be used for a new purpose).

<sup>7</sup> Such act would contravene DPP1(1) (see footnote 6 above) and DPP1(3)(b)(the data subject shall be informed, on or before collection of the data, of the classes of persons to whom the data may be transferred).

<sup>8</sup> Such act would contravene DPP4(1) (all practical steps shall be taken to ensure that personal data is protected against unauthorized or accidental access etc).

(d) The employer retaining the ex-offender's data longer than necessary.<sup>9</sup>

6. Furthermore, there are criminal sanctions against a third party who obtains the ex-offender's conviction record from the latter's employer without that employer's consent, and discloses the personal data unlawfully, in that -

(a) the third party discloses the data with the intent to obtain advantages or to cause loss to the ex-offender;<sup>10</sup>

(b) The third party discloses the data and the disclosure causes psychological harm to the ex-offender.<sup>11</sup>

In both cases the offending third party is liable to a fine of \$1,000,000 and to imprisonment for 5 years.

### ***Related observations***

7. The information under paragraphs 3 – 6 above would be relevant to considerations as to whether there is a need for a legislative scheme, and as to how urgent the need is.

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<sup>9</sup> Such act would contravene DPP4(3) (all practical steps must be taken to ensure that personal data is not kept longer than is necessary for the fulfillment of the purpose for which the data is to be used).

<sup>10</sup> Section 64(1) of the PD(P)O provides:

“(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.”

<sup>11</sup> Section 64(2) of the PD(P)O provides:

“(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

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

8. It is noteworthy that, if the purpose is to make conviction record checking mandatory by providing statutory sanctions against employers and employees in work relating to children and PMIs who fail to make the conviction record check, then the PD(P)O would not help achieve that purpose.

9. It should also be added that, the fact that there are already provisions under the PD(P)O which could be invoked to deal with cases of contravention of privacy protection principles does not necessarily mean that new provisions should not or need not be enacted. Depending on what policy objectives are to be achieved the existing provisions may or may not be sufficient to meet all the needs, and new enactments may have the benefit of addressing the policy objectives more directly.

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