

**PCPD’s Submission in response to
Interim Report and Consultative Paper on
Review of Family Procedure Rules**

The Chief Justice’s Working Party on Family Procedure Rules (“**Working Party**”) issued an Interim Report and Consultative Paper on Review of Family Procedure Rules (“**Consultative Paper**”) to, inter alia, formulate proposals and consult the public for possible reforms to the family procedure rules with the main objective of enhancing the effectiveness of the family justice system.

2. The family justice system embraces a wide range of subject matters, such as family and matrimonial matters with both the Family Court and the High Court exercising concurrent jurisdiction. Many of the legal documents involved in the family cases contain hotly contested information about the parties’ means, behaviours and conducts during marriage, etc. Mishandling of such sensitive data will be intrusive to one’s privacy rights. As the regulator to protect the privacy of individuals in relation to personal data, the Office of the Privacy Commissioner for Personal Data (“**PCPD**”) would invite the Chief Justice to consider the impact on individuals’ personal data privacy when formulating new procedural rules (“**New Code**”). Below are the PCPD’s comments in relation to some of the proposals mentioned in the Consultative Paper which may affect individuals’ personal data privacy.

Service and Acknowledgement

(I) **By leaving legal documents at the last known address**

3. The mode of service and acknowledgement for service of legal documents in matrimonial proceedings are governed by the provisions set out

in the Matrimonial Causes Rules (Cap.179A) (“**MCR**”). Under **Proposal 28** of the Consultative Paper, the Working Party proposed that generally the present provisions governing service should be retained but refined and consolidated into a single set of self-contained procedural rules in the New Code. Currently, the mode of service to be employed will depend on the type of documents in various proceedings under the relevant rules, including the MCR. The mode of service may take the form of personal service, leaving or sending the documents by ordinary post to the solicitor’s address or leaving or sending the documents to the party’s last known address, etc.¹ Order may be given by the court in appropriate cases for deemed service, substituted service or dispensation with service of the documents.

4. Proper service of the legal proceedings and court documents will ensure that the matters are brought to the notice of the relevant parties to the proceedings so that they can respond accordingly. Nonetheless, mishandling of the legal documents will run the risks of disclosing the relevant parties’ sensitive personal data to third parties who are unrelated to the proceedings, thereby intruding their privacy rights.

5. Pursuant to Data Protection Principle (“**DPP**”) 4(1) in Schedule 1 of the Personal Data (Privacy) Ordinance (“**PDPO**”), a data user is required to take all reasonably practicable steps to ensure personal data is protected against unauthorized or accidental access, processing, erasure, loss or use².

¹ Various modes of service and their relevant rules under the MCR are outlined in paragraph 161 of the Consultative Paper.

² (1) All practicable steps shall be taken to ensure that personal data (including data in a form in which access to or processing of the data is not practicable) held by a data user are protected against unauthorized or accidental access, processing, erasure, loss or use having particular regard to-

- (a) the kind of data and the harm that could result if any of those things should occur;
- (b) the physical location where the data is stored;
- (c) any security measures incorporated (whether by automated means or otherwise) into any equipment in which the data is stored;
- (d) any measures taken for ensuring the integrity, prudence and competence of persons having access to the data; and
- (e) any measures taken for ensuring the secure transmission of the data.

6. The PCPD has received complaints from the parties to legal proceedings (including matrimonial proceedings) alleging breach of DPP4(1) when legal documents were served on them at the parties' last known home or office addresses. The common features of these complaints are:-

(a) Service by leaving at the home address

- Legal documents were left unattended after leaving them outside the premises of the litigants' last known addresses so that they were easily accessible to passers-by or unrelated parties. It was not possible for voluminous hearing bundles contained in box files to be inserted into the letter box, or slipped through the gate/door of the premises. This mode of service was however endorsed and accepted by the Court as good service where the hearing bundles in matrimonial proceedings (contained in bags) were tied to the gate outside the relevant address and the caretaker thereat had been so informed.

(b) Service by leaving at the office address

- Legal documents were served to the office address of the litigant and the receptionist of the office was asked to sign on unsealed copies of the legal documents or letters of service, with the contents of the documents or the nature of the matrimonial proceedings exposed.

7. While the reasonably practicable steps (for the purpose of fulfilling DPP4) to be taken will depend on individual circumstances, the PCPD had previously reminded solicitors' firms through a letter distributed through a circular issued by the Law Society (Circular 08-417(PA)) on 21 July 2008 to its members the importance of observing the requirements of DPP4 by taking reasonably practicable steps when serving legal documents. In particular, the

PCPD pointed out:-

“3.personal data related to litigation are generally sensitive in nature. Disclosure of documents containing such information to unrelated parties may cause embarrassment or even serious harm to the data subject concerned. (The PCPD) would like to see greater care being exercised when this kind of documents are delivered or served. Practicable steps should include:-

- (a) delivering documents in sealed envelope marked “Private & Confidential” and, where appropriate, “To be Opened by Addressee Only”;*
- (b) avoiding leaving documents in common area or places where any passerby may have access;*
- (c) avoiding leaving documents with unrelated parties such as neighbors or caretakers;*
- (d) ensuring correctness of the address for service; and*
- (e) not disclosing contents of documents to unrelated parties for the sake of getting an acknowledgement of receipt of the document.”*

8. In view of the above, the PCPD would invite the Working Group to consider if it is feasible to insert in the New Code some guidance to safeguard privacy when serving legal documents as follows:-

- Enclosing the legal documents in sealed envelope and marked *“Private & Confidential”* and, where appropriate, *“To be Opened by Addressee Only”*.
- Making sure no sensitive data (e.g. HKID number) are visible through envelope window.

- Not disclosing the contents of legal documents to unrelated parties for the sake of getting an acknowledgement receipt of the documents.
- Where the circumstances make it impracticable for the legal documents to be personally served or delivered by post (e.g. (1) the hearing date is so close that there is insufficient time for the postal service to be effected, or (2) the last known address cannot be reached by postal service), and the service is required to be effected by leaving the documents at the last known address, all reasonably practicable steps shall be taken to ensure personal data contained therein is protected against unauthorized or accidental access, processing, erasure, loss or use.
- Where it is impracticable for the legal documents to be inserted into the letter box, or slipped through the gate/ door of the premises when serving legal documents by leaving them at the last known address, all reasonably practicable steps must be taken to ensure that they are not left unattended in common area or places where any passerby may have access.
- The reasonably practicable steps to be taken may include providing the party to be served (through either telephone, letter or email) with an option to collect the legal documents at a place to be agreed between the parties. This may not be a viable option because (1) the party to be served cannot be so contacted by telephone or email address, or (2) the party to be served has expressly rejected collection of any legal documents, or (3) the hearing date is so close that there is no certainty that the party to be served will turn up to collect the documents in advance.

(II) *By fax or other means of communications*

9. It is also noted that **Proposal 30** of the Consultative Paper invited views as to whether documents other than originating process and judgment summons should, as a matter of principle, be permitted to be served by fax or other electronic communication in line with the UK Family Procedure Rules 2010³. The Working Party will make recommendation in this regard to the Chief Judge subject to the overall development and implementation of the Information Technology Strategy Plan to be formulated by the Judiciary on the use of Information Technology for its operation in the years to come.

10. The PCPD would like to point out that the privacy risks in association with using fax or other electronic means of communication for service must be properly recognised and addressed.

11. The PCPD has previously received complaints concerning the faxing of letters or legal documents containing sensitive personal data in such circumstances that the documents were likely to be read by other unintended recipients, e.g. sending the documents to a corporate fax number with the risk that other persons in the company may also gain access to the documents.

12. On the other hand, it must be noted that documents mistakenly transmitted through email to an unintended recipient may be further forwarded to other parties just by the press of a button, and thereby aggravating the privacy risks of unauthorized or accidental access, loss or use of the personal data involved.

13. In the circumstances, it is crucial for the party to be made fully aware of the privacy risks involved in such mode of service, and consider taking

³ Currently, service by fax or email is not a permissible mode of service of legal documents. (see paragraph 10/1/11, Hong Kong Civil Procedure 2014 Vol. 1)

additional steps as follows:-

- The party to be served must have previously indicated in writing to the party serving that he/ she or the solicitors' firms are willing to be so served, and the fax number or email address through which the documents are to be so served has been confirmed⁴.
- Where practicable, adopt encryption to protect the legal documents before serving the same through email.
- Where practicable, notify the party to be served before sending the legal documents through fax, email or other communication means.

14. The PCPD must stress that these additional steps are not meant to be an exhaustive list of all reasonably practicable steps to be taken when serving legal documents in compliance with the requirements under DPP4. The serving party must take account of the particular circumstances during service of legal documents which may require further additional steps to be taken to protect the personal data contained therein. When adjudicating whether all reasonably practicable steps have been taken by the serving party in compliance with DPP4, the PCPD will take into account all the circumstances regarding the service of the legal documents.

Hearing and reporting of proceedings and judgments

15. The PCPD supports **Proposals 52 and 120** to preserve the current mode of hearing in Chambers (not being open to the public), and that all proceedings to which the New Code applies should be held in private, but the court retains

⁴ Reference is made to similar requirements as provided under paragraph 4.1 of the UK Practice Direction 6A – Service within the United Kingdom which has been adopted in the UK Family Procedures Rules 2010.

the discretion to order the hearing be open to the public if it is of the view that none of the reasons in Article 10 of the Hong Kong Bill of Rights is satisfied in the circumstances of the case. Interest of the private lives of the parties is one of the reasons in Article 10 to exclude the press and the public from all or part of a trial.

16. Furthermore, the Working Party proposed under **Proposal 121** to incorporate into a new practice direction under the New Code on the current practice of the Family Court and the Chief Judge's internal instruction that publication of all judgments in family and matrimonial cases should be suitably anonymized before release. The PCPD supports this proposal which seeks to protect the privacy rights of the relevant parties (including children, spouses or cohabitees). The purposes of dissemination of judgments and the development of case law can be equally achieved without disclosing the identities or personal particulars of the parties concerned. The personal data privacy rights of the parties concerned should be properly protected.

17. In particular, it must be noted that once a judgment (containing the parties' personal data) has been published, it is generally difficult to regulate or restrict the further use of the personal data. At present, DPP3 in Schedule 1 of the PDPO governs the use of personal data. It provides that except with the express and voluntary consent given by the data subject, personal data shall not be used for a purpose other than the original collection purpose or a directly related purpose. Although DPP3 still applies to the personal data made public in the judgment, it cannot be invoked if the persons who misuse the personal data in the judgments are located overseas and they are not controlling the holding processing or use of the data in or from Hong Kong.

18. In addition, as there is no express restriction on the secondary use of personal data contained in the judgments, it is advisable to adopt measures to give notice to the public on the purpose of publication of the judgments and to

restrict any secondary use of the personal data contained therein.

Access to court documents

19. Under **Proposal 122**, it is recommended that the general provisions on access to court documents (i.e. Order 63 rule 4 of the Rules of High Court and Rules of District Court) and the specific requirements under Rule 121(2) of the MCR restricting public's access to and inspection of documents filed with court in relation to matrimonial proceedings and Rule 21 of the Adoption Rules on restriction against provision of adoption order should be incorporated into the New Code. It is further proposed that the confidentiality protection be extended to all documents filed in children proceedings save with the leave of court.

20. The PCPD supports the proposal to codify the aforesaid confidentiality protection and extend the same to all children proceedings. Such extension will presumably cover proceedings issued under the Adoption Ordinance (Cap.290), Parent and Child Ordinance (Cap.429) and Guardianship of Minors Ordinance (Cap.13), etc.

21. On the other hand, as the family law system is rather fragmented, the Rules of High Court (Cap.4A) and Rules of District Court (Cap.336H) will apply (with necessary modifications) to family proceedings. Even though access to court documents by members of the public (under Order 63 rule 4 of Cap. 4A and 336H) is subject to the discretion of the court, the PCPD would invite the Working Party to consider extending the appropriate scope of the confidentiality protection to all family proceedings⁵.

⁵ "Family Proceedings" include proceedings issued under the following Ordinances, and any of their respective subsidiary legislation: (1) Adoption Ordinance (Cap.290); (2) Domestic Violence Ordinance or the Domestic and Cohabitation Relationships Violence Ordinance, as the case may be (Cap.189); (3) Guardianship of Minors Ordinance (Cap.13); (4) Legitimacy Ordinance (Cap.184); (5) Maintenance Orders (Reciprocal Enforcement) Ordinance (Cap.188); (6) Marriage Ordinance (Cap.181); (7) Married Persons Status Ordinance (Cap.182); (8) Marriage Reform Ordinance (Cap.178); (9) Parent

Anonymisation

22. It is proposed under **Proposal 123** that the New Code should incorporate Rule 6 and 14A(5) of the Adoption Rules governing anonymisation of the identities of the parties concerned⁶ and include other provisions for anonymisation in children proceedings to preserve confidentiality as from the filing of originating process.

23. The PCPD supports the aforesaid proposal which seeks to protect the privacy rights of the relevant parties in relation to adoption and other children proceedings. The data in question is considered private and sensitive in nature and require additional protection for the benefit of the children.

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Office of the Privacy Commissioner for Personal Data

and Child Ordinance (Cap.429); (10) Separation and Maintenance Orders Ordinance (Cap.16); (11) Part IIA of the Matrimonial Proceedings and Property Ordinance (Cap.192); and (12) Inheritance (Provision for Family and Dependents) Ordinance (Cap.481). (see Practice Direction 15.12)

⁶ The identities of (1) an applicant for an adoption order, and (2) the identity of a parent who applies for revocation of consent, are anonymized.