

**RESPONSE TO THE PUBLIC CONSULTATION PAPER ISSUED BY THE
MINISTRY OF COMMUNICATIONS AND INFORMATION AND THE PERSONAL
DATA PROTECTION COMMISSION**

**DRAFT PERSONAL DATA PROTECTION (AMENDMENT) BILL, INCLUDING
RELATED AMENDMENTS TO THE SPAM CONTROL ACT**

28 May 2020

Donaldson & Burkinshaw LLP

24 Raffles Place #15-00 Clifford Centre Singapore 048621
<http://www.donburk.asia>

Jansen Aw
Partner

jansen.aw@donburk.asia

Ngaim Ruo Ling
Associate

ruoling.ngaim@donburk.asia

1. INTRODUCTION & STATEMENT OF INTEREST

- 1.1. We are thankful for the opportunity to provide our response to the Ministry of Communications and Information (“**MCI**”) and the Personal Data Protection Commission (“**PDPC**”) in respect of the public consultation paper (“**Consultation Paper**”) in relation to the draft Personal Data Protection (Amendment) Bill (“**Bill**”).
- 1.2. We helm from Donaldson & Burkinshaw LLP (“**D&B**”). Established in 1874, D&B is one of the oldest law firm in Singapore that has a wide range of practice areas including intellectual property, data protection, litigation & dispute resolution, corporate and commercial, and real estate. Specifically, in our data protection practice, we serve a wide range of clients including multinational companies and small-medium enterprises.
- 1.3. The Bill is a timely update to the Personal Data Protection Act 2012 (No. 26 of 2012) (“**PDPA**”) and Spam Control Act (Cap. 311A) (“**Spam Control Act**”). With the advent of new technology and growth in areas such as Big Data, Internet-of-Things and Artificial Intelligence, there is a need for the law to keep pace with these developments. There is much potential in the adoption and usage of such new technologies; it is not just corporations which stand to benefit, but their consumers and clients too, as new and improved services can be offered by corporations to their consumers and clients. The proposed changes to the PDPA and Spam Control Act is thus a welcomed one as they seek to pave the way for, and encourage, companies to adopt and embrace such new technology and innovation, whilst protecting individuals from harm that may arise from an abuse or misuse of such technologies.
- 1.4. Based on our experiences and the feedback we have received on this area of law and practice, we hope to provide our views and insights and to contribute meaningfully to this public consultation.
- 1.5. We can be contacted at the contact details stated in the cover page.

2. SUMMARY OF OUR COMMENTS

- 2.1. Our proposal below centres on several tweaks to the wording of the Bill to augment clarity in the interpretation and application of the Bill. This would enable companies and organisations to have a better understanding and certainty of what are the required obligations and measures to implement under the proposed Bill.

3. COMMENTS

3.1. Page 10 of the Bill, proposed Section 26D(1):

- 3.1.1. Our comment relates to the computation of time to notify PDPC of a data breach.
- 3.1.2. The proposed Section 26D(1) states that where an organisation assesses that a data breach is a notifiable data breach, the organisation must notify the PDPC as soon as it is practicable, but in any case "no later than 3 days after the day the organisation make that assessment".
- 3.1.3. Paragraph 20 of the Consultation Paper provides that there is a "cap of three calendar days" [emphasis added]. This is a helpful guidance as to how long the period for notification is intended to be, that is 3 calendar days.
- 3.1.4. However, Section 50 of the Interpretation Act (Cap. 1) also provides for the computation of time, and under Section 50(b) of the Interpretation Act, where the day on which an act is to be done lands on a Sunday or a public holiday, the period to carry out the act is extended to the next following day not being an excluded day (i.e. Monday, if the third day of notification lands on a Sunday). Thus, if Section 50 of the Interpretation Act were to apply to the date of notification under this proposed section of the Bill, it could mean that the notification date would go beyond three calendar days. It is unclear whether this was the intended effect so as to allow organisations to follow the timeframe under Section 50 of the Interpretation Act.
- 3.1.5. Nevertheless, to avoid confusion, it may be helpful to make clear the exact time period for notification to take place, by defining "days" as "calendar days" (which includes Sundays or public holidays) under the new Bill, if the time period of 3 calendar days is indeed intended.
- 3.1.6. We believe that by providing clarity on the exact period of notification, this would allow organisations to plan ahead the steps to be taken to meet the stipulated deadline.

3.2. Pages 10-11 of the Bill, proposed Section 26D(2):

- 3.2.1. Our comment relates to the time to notify an individual of a data breach.
- 3.2.2. Subsection (2) provides that subject to Subsections (4), (6) and (7), the organisation must also notify, on or after notifying the PDPC, each individual to whom significant harm results or is likely to result from a notifiable data breach in any manner that is reasonable in the circumstances.

3.2.3. It would appear that there is no express timeframe given in respect of when the organisation must notify the individual under this provision. However, our reading of this subsection is that the time in which to notify the individual would be subject to the overarching principle of “reasonableness” under the current Section 11(1) of the PDPA, and hence notification would need to be given within “reasonable” time taking into consideration all the circumstances.

3.2.4. If this is the intent, it is proposed that PDPC sets out in its Advisory Guidelines of such an interpretation, so as to reinforce (and to bring certainty to) the understanding for organisations to comply.

3.3. **Page 18 of the Bill, Amendment of the current Section 29:**

3.3.1. Our comment relates to the imposition of financial penalty on an organisation or person.

3.3.2. The proposed Subsection (2A)(a) provides that the amount of financial penalty must not exceed, "where the direction is given to an organisation or a person" [emphasis added] with an annual turnover exceeding S\$10 million, 10 % of the annual turnover. Our comments relate to the words “organisation or a person” in relation to this provision on the penalties for infringement of the PDPA.

3.3.3. “Person” under Section 2(1) of the Interpretation Act is defined as including any company or association or body of persons, corporate or unincorporate.

3.3.4. Section 2(1) of the PDPA similarly defines “organisation” widely, and it includes any individual, company, association or body of persons, corporate or unincorporated. “Individual” under Section 2(1) of the PDPA refers to a natural person, whether living or deceased.

3.3.5. There therefore appears to be much overlap between the definition of “organisation” and “person”, and it may be confusing to use both in a single provision, as both definitions can refer to (i) company or association or body of persons, corporate or unincorporate (“**corporate entity**”) as well as (ii) natural persons.

3.3.6. For completeness, we should highlight that in the current PDPA, the provisions on penalties (such as the current Section 51(2) and Section 56 of the PDPA) only refer to a “person” who may be liable for an offence or penalty.

3.3.7. In order to avoid confusion, we propose either maintaining the single usage of the word “person” (and not to both “organisation and person”), or to make clear in the definition the distinction between a corporate entity and a natural person, in respect of Subsection (2A)(a) of Section 29 of the Bill¹.

3.4. **Defining “sensitive personal data” under the new Bill:**

3.4.1. We would also like to end off by commenting that in light of the current amendments to the PDPA, it may perhaps be helpful if the PDPA would additionally provide a definition of “sensitive personal data” in the new Bill. This would provide some certainty to organisations in understanding the types or categories of personal data that would fall under this definition, and for them to be able to organise their processes and practices to provide a commensurately higher form of protection for such personal data accordingly.

3.4.2. We note that under the Advisory Guidelines on the PDPA for NRIC and other National Identification Numbers (collectively, “**ID numbers**”) which took effect on 1 September 2019, ID numbers are one such type of sensitive personal data which needs to be afforded greater protection. The PDPC has also expressly recognised in several of its Grounds of Decision (such as in *Re Aviva Ltd* [2017] SGPDP 14) the notion of such sensitive personal data. Indeed, there are a number of countries that have adopted a definition of “sensitive personal data” in their legislation, and the European Union’s General Data Protection Regulation (EU) 2016/679 and South Korea’s Personal Information Protection Act are two such examples.

3.4.3. We appreciate that there may be a broad spectrum of the types of categories of personal data that may be “sensitive”, however it may still be useful if a broad definition of “sensitive personal data” is given under the new Bill to aid businesses, at least on a broad level, in identifying and providing a correspondingly higher form of protection for such personal data accordingly.

4. CONCLUSION

4.1. The amendments and revisions of the PDPA and Spam Control Act to embrace the advancement of technology and to keep up with the changing business landscape is indeed a timely step forward in the area of data protection and technology law in Singapore, and we welcome them.

¹ If such distinction is made in respect of the proposed amended Section 29, we would also suggest the same distinction be made to the other sections of the PDPA and the proposed sections or proposed amended sections in the Bill such as the proposed Section 31A, proposed amended Section 50 and proposed amended Section 51.

4.2. Please do not hesitate to contact us should you wish to have a discussion on this submission. Thank you once again for the opportunity to be part of the PDPC's unceasing efforts in fortifying the personal data protection regime in Singapore.

Yours faithfully,

DONALDSON & BURKINSHAW LLP

Jansen Aw | Ngaim Ruo Ling

Partner | Associate

jansen.aw@donburk.asia | ruoling.ngaim@donburk.asia