

LEGISLATIVE COUNCIL

Bills Committee

Personal Data (Privacy) (Amendment) Bill 2011

Major Concerns on Specific Clauses as at 18 April 2012

Ordinance = Personal Data (Privacy) Ordinance

PCPD = Office of the Privacy Commissioner for Personal Data

HKAB = The Hong Kong Association of Banks

DPP = Data Protection Principle

<u>Section</u>	<u>Topic</u>	<u>PCPD's Comments</u>
Part VIA section 35D	Grandfathering Arrangement	<p><u>Conditions for grandfathering arrangement</u></p> <ul style="list-style-type: none"> ● The proposed grandfathering arrangement under section 35D(1) has set out certain conditions that a data user has to meet. These conditions include: (i) that data subject had been explicitly informed of the use of the data subject's personal data in direct marketing in relation to the class of marketing subjects; (b) the data user had so used the data; (iii) the data subject had not required the data user to cease to so use the data; and (iv) the data subject had not, in relation to the use, contravened any provision of the Ordinance as in force as at the time of the use. ● The PCPD considers it important to incorporate also the requirement under s.35C(4) as a further condition to be satisfied under s.35D(1). The purpose is to ensure that the data user has presented the information on the use of personal data in direct marketing in a manner which is easily understandable and readable for the grandfathering arrangement to apply. This requirement has already been included in PCPD's Guidance on Collection and Use of Personal Data in Direct Marketing issued in October 2010. <p><u>Imposing a cut-off date before the commencement date</u></p> <ul style="list-style-type: none"> ● It is expected that the commencement date for Part VIA will not be an immediate future date in order to allow sufficient time for data users to prepare for the documentation and procedural

changes and IT system enhancement, and for PCPD to draw up the new guidance for data users' compliance and to undertake other promotion and education activities to introduce the amended Ordinance. The HKAB has suggested a lead time of not less than 10 months from the passing of the Amendment Bill.

- The PCPD is concerned that some data users may during this intervening period carry out massive direct marketing activities for the purpose of avoiding as far as possible compliance with the new requirements after the commencement date. In order to prevent this happening, the PCPD proposes to specify a cut-off date under s.35D(1) [a date as soon as possible after passing of the Amendment Bill] after which the data user cannot rely on section 35D(1) to seek cover under the grandfathering arrangement.

Personal data to be covered

- The Administration intends to accede to an industry body's request that the grandfathering arrangement would apply to the use of any personal data of the data subject in relation to the same class of marketing subject if any of the data subject's personal data had been used before the commencement date (see paragraph 5 of CMAB's LC paper No.CB(2)1701/11-12(03)).
- In effect, this means that if a data user has used the mobile phone number of the data subject to market a product before the commencement date and such use is consistent with the prescribed conditions under section 35D(1)(a), (b), (c) and (d), the grandfathering arrangement will not only apply to the telephone number so used but also to other personal data already held by the data user prior to the commencement date, such as residential address, email address, residential telephone number, etc.
- The PCPD understands from the industry body that the grandfathering arrangement would also apply to future updates of all personal data held by a data user before the commencement date. For example, if a data subject updates his address or monthly income after the commencement date, the data user may continue to use the updated data without regard to the requirements of the new regulatory regime.
- In this regard, the PCPD is concerned that the current wording of section 35D(1):-
 - does allow an interpretation that the grandfathering

		<p>arrangement will not cover those personal data that a data user had not used before the commencement date.</p> <ul style="list-style-type: none"> ➤ has not catered for updating of personal data after the commencement date.
Part VIA section 35E(1)(b)	Use of Personal Data in Direct Marketing	<ul style="list-style-type: none"> ● The revised proposal to obtain oral consent represents a watering down of the protection offered to the data subject as compared with the previous proposal to obtain a written response from the data subject. ● In order to offset this dilution as far as possible, the PCPD suggests that the following additional requirements be incorporated in section 35E(1)(b):- <ul style="list-style-type: none"> ➤ That the written confirmation has to be sent not later than 14 days after the oral consent is given; ➤ That the written confirmation has to be sent to the <u>last known correspondence address</u> of the data subject which includes residential address, email address and SMS; and ➤ That the data user <u>has not received any objection</u> from the data subject to the oral consent within 14 days after the written confirmation is sent to the data subject.
Part VIA section 35K	Provision of Personal Data for use in Direct Marketing (previously labelled as sale or transfer of personal data to third parties)	<ul style="list-style-type: none"> ● The PCPD reiterates its long-held stance that an express and informed consent should be obtained from the data subject prior to such “sale” or transfer of personal data to third parties. An <u>oral</u> consent falls short of this standard. Hence, the Administration’s previous proposal should be maintained, that is, the data user must not “sell” or transfer the data subject’s personal data to third parties unless the latter’s <u>written</u> consent has been received.
Part VIA	Source of Personal Data	<ul style="list-style-type: none"> ● The PCPD previously proposed to confer on individuals a right to be informed of the source of their personal data by direct marketers. The Administration has not adopted the proposal. ● At the Bills Committee meeting held on 26 November 2011, the depositions indicated no objection to PCPD’s proposal. Indeed, direct marketers expressed that their code of practice required them to disclose the source of data to customers who made such

		<p>enquiries and to give a reply in 7 days.</p> <ul style="list-style-type: none"> ● At the Bills Committee meeting on 17 April 2012, Hon. James To expressed his concerns that under the Ordinance, individuals cannot trace the source of the personal data being used by direct marketers. ● In view of the above, the PCPD hopes that the Administration could re-consider incorporating this meaningful proposal into the Bill.
Section 50(1A)(c)	Enforcement Notice	<ul style="list-style-type: none"> ● The existing section 50(1)(iii) confers power on the Commissioner to issue an enforcement notice to direct a data user to take steps “to remedy the contravention, or as the case may be, <u>the matters occasioning it</u>”. ● The new section 50(1A)(c) has taken away the words “the matters occasioning it”. ● As previously raised by PCPD (LC paper No. CB(2)596/11-12(01)), the cause of contravention may be due to indirect factors such as the inadequacy or absence of the data user’s policy practice, or procedure. The PCPD is concerned that the deleting of the words “matters occasioning it” from the new provision will take away the Commissioner’s power to address such indirect factors in the enforcement notice.
Section 58(6)	Definition of Crime	<ul style="list-style-type: none"> ● Section 58 exempts personal data from the application of DPP 3 (use), DPP6 and section 18(1)(b) (access) where personal data are used or held (as the case may be) for the purposes of the prevention or detection of crime and the apprehension, prosecution or detention of offenders, etc. ● Section 58 does not define the meaning of “crime” and “offender”. Hence, the new section 58(6) defines “crimes” as (a) an offence under the laws of Hong Kong; or (b) if personal data is held or used in connection with legal or law enforcement cooperation between Hong Kong and a place outside Hong Kong, an offence under the laws of that place. Similarly, the word “offender” is defined as a person who commits a crime. ● It is understood that HKAB would propose to further expand the definition of “crime” to include an offence under the laws of a place outside Hong Kong if the conduct that constitutes the offence, had it occurred in Hong Kong, would constitute an

		<p>offence under the laws of Hong Kong.</p> <ul style="list-style-type: none"> ● The intention of HKAB is to facilitate cross-border data transfer for the purpose of detection of money laundering and terrorist financing activities. ● PCPD fully appreciates the necessity to combat money laundering and terrorist financing activities but is concerned that the proposal, if not properly constituted, would permit disclosure of personal data to facilitate investigation of crime committed outside Hong Kong by various data users to overseas requestors without sufficient safeguards. ● Section 58(1)(a) does not limit the type or nature of data user covered by the exemption. It may therefore open up disclosure of information to <u>any data users</u> to facilitate investigation of <u>overseas crime of various kinds</u>, including relatively minor crimes. ● The proposal may open up a back door too wide that is beyond control, particularly as s.33 is not yet effective, posing the risk that the personal data transferred will not be subject to the same or substantially similar protection as in Hong Kong. ● Reliance on the existing arrangement of mutual assistance for cross-border law enforcement may be sufficient to deal with HKAB's concern whereby overseas law enforcement agency may seek assistance from Hong Kong through the DoJ. ● The arrangements in overseas jurisdictions lend support to the PCPD's views above. For example, similar exemptions for investigation of crime/offence in the Australia and New Zealand Privacy Acts require that the disclosure of data is for the purpose of prevention, detection, investigation, prosecution or punishment of criminal offences, etc. <u>by or on behalf of a local law enforcement body or public sector</u>. Moreover, the aforesaid overseas data protection laws contain provisions in respect of restriction on cross border transfer of personal data. Reference may be made to the following provisions:- <ul style="list-style-type: none"> ➤ Australia Privacy Act (1988) - National Privacy Principle 2.1(h)(i) in Schedule 3, definition of "enforcement body" in section 6 and National Privacy Principle 9; ➤ New Zealand Privacy Act (1993) - Information Privacy Principles 10(c)(i) and 11(e)(i), definition of "public sector agency" in section 2 of Part 1 and Part 11A. (Annex A) ● If the Administration is minded to take forward HKAB's proposal,
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		<p>one acceptable approach is to specify the crimes that warrant exemption, e.g. anti-money laundering. Additional safeguards should also be imposed to ensure that the personal data transferred will receive the same or similar level of protection as under the Ordinance.</p>
Section 66B	Commissioner may grant assistance in respect of proceedings	<ul style="list-style-type: none"> ● In relation to the provision of legal assistance to aggrieved data subjects, while the PCPD may brief out appropriate cases to external legal professionals, it is envisaged that some cases would be more cost-effectively dealt with by PCPD's internal legal team. ● However, there is no express provision in the Bill which empowers the in-house lawyers of PCPD to provide legal services to the public such as provision of legal advice, attendance in court and other assistance which is necessary for and incidental to the legal proceedings. By contrast, the Legal Aid Counsel is expressly conferred under section 3(3) of the Legal Aid Ordinance (Cap.91) of <i>“all rights, powers, privileges, and duties of a barrister and solicitor duly admitted under the Legal Practitioners Ordinance (Cap.159), including a right of audience before any court or the Court of Final Appeal.”</i> ● Further, the relationship between the PCPD's in-house lawyers and the aided person is not clearly defined. In particular, there is uncertainty as to whether the legal advice given by an “employed solicitor/barrister” to the aided person can enjoy legal professional privilege. By contrast, a Legal Aid Counsel enjoys, pursuant to section 24 of the Legal Aid Ordinance, <i>“the like privileges and rights as those which arise from the relationship of client, counsel and solicitor acting in their professional employment”</i>. ● PCPD therefore recommends incorporating in the Bill additional clauses that are similar to s.3(2)-(3) and 24(1) of Legal Aid Ordinance. Further reference can be made to ss.2A, 3(1) & (2) of Legal Officers Ordinance (Cap.87). (Annex B)



Privacy Act 1988

Act No. 119 of 1988 as amended

This compilation was prepared on 13 February 2012
taking into account amendments up to Act No. 60 of 2011

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Clause 2

2 Use and disclosure

- 2.1 An organisation must not use or disclose personal information about an individual for a purpose (the *secondary purpose*) other than the primary purpose of collection unless:
- (a) both of the following apply:
 - (i) the secondary purpose is related to the primary purpose of collection and, if the personal information is sensitive information, directly related to the primary purpose of collection;
 - (ii) the individual would reasonably expect the organisation to use or disclose the information for the secondary purpose; or
 - (b) the individual has consented to the use or disclosure; or
 - (c) if the information is not sensitive information and the use of the information is for the secondary purpose of direct marketing:
 - (i) it is impracticable for the organisation to seek the individual's consent before that particular use; and
 - (ii) the organisation will not charge the individual for giving effect to a request by the individual to the organisation not to receive direct marketing communications; and
 - (iii) the individual has not made a request to the organisation not to receive direct marketing communications; and
 - (iv) in each direct marketing communication with the individual, the organisation draws to the individual's attention, or prominently displays a notice, that he or she may express a wish not to receive any further direct marketing communications; and
 - (v) each written direct marketing communication by the organisation with the individual (up to and including the communication that involves the use) sets out the organisation's business address and telephone number and, if the communication with the individual is made by fax, telex or other electronic means, a number or address at which the organisation can be directly contacted electronically; or

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- (d) if the information is health information and the use or disclosure is necessary for research, or the compilation or analysis of statistics, relevant to public health or public safety:
 - (i) it is impracticable for the organisation to seek the individual's consent before the use or disclosure; and
 - (ii) the use or disclosure is conducted in accordance with guidelines approved by the Commissioner under section 95A for the purposes of this subparagraph; and
 - (iii) in the case of disclosure—the organisation reasonably believes that the recipient of the health information will not disclose the health information, or personal information derived from the health information; or
 - (e) the organisation reasonably believes that the use or disclosure is necessary to lessen or prevent:
 - (i) a serious and imminent threat to an individual's life, health or safety; or
 - (ii) a serious threat to public health or public safety; or
 - (ea) if the information is genetic information and the organisation has obtained the genetic information in the course of providing a health service to the individual:
 - (i) the organisation reasonably believes that the use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety (whether or not the threat is imminent) of an individual who is a genetic relative of the individual to whom the genetic information relates; and
 - (ii) the use or disclosure is conducted in accordance with guidelines approved by the Commissioner under section 95AA for the purposes of this subparagraph; and
 - (iii) in the case of disclosure—the recipient of the genetic information is a genetic relative of the individual; or
 - (f) the organisation has reason to suspect that unlawful activity has been, is being or may be engaged in, and uses or discloses the personal information as a necessary part of its investigation of the matter or in reporting its concerns to relevant persons or authorities; or
 - (g) the use or disclosure is required or authorised by or under law; or
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Clause 2

- (h) the organisation reasonably believes that the use or disclosure is reasonably necessary for one or more of the following by or on behalf of an enforcement body:
 - (i) the prevention, detection, investigation, prosecution or punishment of criminal offences, breaches of a law imposing a penalty or sanction or breaches of a prescribed law;
 - (ii) the enforcement of laws relating to the confiscation of the proceeds of crime;
 - (iii) the protection of the public revenue;
 - (iv) the prevention, detection, investigation or remedying of seriously improper conduct or prescribed conduct;
 - (v) the preparation for, or conduct of, proceedings before any court or tribunal, or implementation of the orders of a court or tribunal.

Note 1: It is not intended to deter organisations from lawfully co-operating with agencies performing law enforcement functions in the performance of their functions.

Note 2: Subclause 2.1 does not override any existing legal obligations not to disclose personal information. Nothing in subclause 2.1 requires an organisation to disclose personal information; an organisation is always entitled not to disclose personal information in the absence of a legal obligation to disclose it.

Note 3: An organisation is also subject to the requirements of National Privacy Principle 9 if it transfers personal information to a person in a foreign country.

2.2 If an organisation uses or discloses personal information under paragraph 2.1(h), it must make a written note of the use or disclosure.

2.3 Subclause 2.1 operates in relation to personal information that an organisation that is a body corporate has collected from a related body corporate as if the organisation's primary purpose of collection of the information were the primary purpose for which the related body corporate collected the information.

2.4 Despite subclause 2.1, an organisation that provides a health service to an individual may disclose health information about the individual to a person who is responsible for the individual if:

- (a) the individual:
 - (i) is physically or legally incapable of giving consent to the disclosure; or

eligible communications service means a postal, telegraphic, telephonic or other like service, within the meaning of paragraph 51(v) of the Constitution.

eligible hearing service provider means an entity (within the meaning of the *Hearing Services Administration Act 1997*):

- (a) that is, or has at any time been, engaged under Part 3 of the *Hearing Services Administration Act 1997* to provide hearing services; and
- (b) that is not covered by paragraph (a), (b), (c), (d), (e), (f), (g), (h) or (j) of the definition of ***agency***.

employee record, in relation to an employee, means a record of personal information relating to the employment of the employee. Examples of personal information relating to the employment of the employee are health information about the employee and personal information about all or any of the following:

- (a) the engagement, training, disciplining or resignation of the employee;
- (b) the termination of the employment of the employee;
- (c) the terms and conditions of employment of the employee;
- (d) the employee's personal and emergency contact details;
- (e) the employee's performance or conduct;
- (f) the employee's hours of employment;
- (g) the employee's salary or wages;
- (h) the employee's membership of a professional or trade association;
- (i) the employee's trade union membership;
- (j) the employee's recreation, long service, sick, personal, maternity, paternity or other leave;
- (k) the employee's taxation, banking or superannuation affairs.

enactment includes a Norfolk Island enactment.

enforcement body means:

- (a) the Australian Federal Police; or
- (aa) the Integrity Commissioner; or
- (b) the ACC; or
- (c) Customs; or
- (d) the Australian Prudential Regulation Authority; or

Section 6

- (e) the Australian Securities and Investments Commission; or
- (f) another agency, to the extent that it is responsible for administering, or performing a function under, a law that imposes a penalty or sanction or a prescribed law; or
- (g) another agency, to the extent that it is responsible for administering a law relating to the protection of the public revenue; or
- (h) a police force or service of a State or a Territory; or
- (i) the New South Wales Crime Commission; or
- (j) the Independent Commission Against Corruption of New South Wales; or
- (k) the Police Integrity Commission of New South Wales; or
- (ka) the Office of Police Integrity of Victoria; or
- (l) the Crime and Misconduct Commission of Queensland; or
- (m) another prescribed authority or body that is established under a law of a State or Territory to conduct criminal investigations or inquiries; or
- (n) a State or Territory authority, to the extent that it is responsible for administering, or performing a function under, a law that imposes a penalty or sanction or a prescribed law; or
- (o) a State or Territory authority, to the extent that it is responsible for administering a law relating to the protection of the public revenue.

Federal Court means the Federal Court of Australia.

file number complaint means a complaint about an act or practice that, if established, would be an interference with the privacy of the complainant:

- (a) because it breached a guideline issued under section 17; or
- (b) because it involved an unauthorised requirement or request for disclosure of a tax file number.

financial corporation means a financial corporation within the meaning of paragraph 51(xx) of the Constitution.

foreign corporation means a foreign corporation within the meaning of paragraph 51(xx) of the Constitution.

Clause 8

- (b) one or more of paragraphs 2.1(e) to 2.1(h) (inclusive) apply to the use or disclosure; or
- (c) the use or disclosure is by a prescribed organisation of a prescribed identifier in prescribed circumstances.

Note: There are prerequisites that must be satisfied before the matters mentioned in paragraph (c) are prescribed: see subsections 100(2) and (3).

7.3 In this clause:

identifier includes a number assigned by an organisation to an individual to identify uniquely the individual for the purposes of the organisation's operations. However, an individual's name or ABN (as defined in the *A New Tax System (Australian Business Number) Act 1999*) is not an *identifier*.

8 Anonymity

Wherever it is lawful and practicable, individuals must have the option of not identifying themselves when entering transactions with an organisation.

9 Transborder data flows

An organisation in Australia or an external Territory may transfer personal information about an individual to someone (other than the organisation or the individual) who is in a foreign country only if:

- (a) the organisation reasonably believes that the recipient of the information is subject to a law, binding scheme or contract which effectively upholds principles for fair handling of the information that are substantially similar to the National Privacy Principles; or
- (b) the individual consents to the transfer; or
- (c) the transfer is necessary for the performance of a contract between the individual and the organisation, or for the implementation of pre-contractual measures taken in response to the individual's request; or
- (d) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the individual between the organisation and a third party; or

- (e) all of the following apply:
 - (i) the transfer is for the benefit of the individual;
 - (ii) it is impracticable to obtain the consent of the individual to that transfer;
 - (iii) if it were practicable to obtain such consent, the individual would be likely to give it; or
- (f) the organisation has taken reasonable steps to ensure that the information which it has transferred will not be held, used or disclosed by the recipient of the information inconsistently with the National Privacy Principles.

10 Sensitive information

10.1 An organisation must not collect sensitive information about an individual unless:

- (a) the individual has consented; or
- (b) the collection is required by law; or
- (c) the collection is necessary to prevent or lessen a serious and imminent threat to the life or health of any individual, where the individual whom the information concerns:
 - (i) is physically or legally incapable of giving consent to the collection; or
 - (ii) physically cannot communicate consent to the collection; or
- (d) if the information is collected in the course of the activities of a non-profit organisation—the following conditions are satisfied:
 - (i) the information relates solely to the members of the organisation or to individuals who have regular contact with it in connection with its activities;
 - (ii) at or before the time of collecting the information, the organisation undertakes to the individual whom the information concerns that the organisation will not disclose the information without the individual's consent; or
- (e) the collection is necessary for the establishment, exercise or defence of a legal or equitable claim.

**Reprint
as at 1 April 2012**



New Zealand

Privacy Act 1993

Public Act 1993 No 28
Date of assent 17 May 1993
Commencement see section 1(2)

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Note

Changes authorised by section 17C of the Acts and Regulations Publication Act 1989 have been made in this reprint.

A general outline of these changes is set out in the notes at the end of this reprint, together with other explanatory material about this reprint.

This Act is administered by the Ministry of Justice.

- (5) Where an agency receives a request made pursuant to subclause (1), the agency shall inform the individual concerned of the action taken as a result of the request.

Principle 8

Accuracy, etc, of personal information to be checked before use

An agency that holds personal information shall not use that information without taking such steps (if any) as are, in the circumstances, reasonable to ensure that, having regard to the purpose for which the information is proposed to be used, the information is accurate, up to date, complete, relevant, and not misleading.

Principle 9

Agency not to keep personal information for longer than necessary

An agency that holds personal information shall not keep that information for longer than is required for the purposes for which the information may lawfully be used.

Principle 10

Limits on use of personal information

An agency that holds personal information that was obtained in connection with one purpose shall not use the information for any other purpose unless the agency believes, on reasonable grounds,—

- (a) that the source of the information is a publicly available publication; or
- (b) that the use of the information for that other purpose is authorised by the individual concerned; or
- (c) that non-compliance is necessary—
 - (i) to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or

- (ii) for the enforcement of a law imposing a pecuniary penalty; or
 - (iii) for the protection of the public revenue; or
 - (iv) for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or
- (d) that the use of the information for that other purpose is necessary to prevent or lessen a serious and imminent threat to—
- (i) public health or public safety; or
 - (ii) the life or health of the individual concerned or another individual; or
- (e) that the purpose for which the information is used is directly related to the purpose in connection with which the information was obtained; or
- (f) that the information—
- (i) is used in a form in which the individual concerned is not identified; or
 - (ii) is used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or
- (g) that the use of the information is in accordance with an authority granted under section 54.

Principle 11

Limits on disclosure of personal information

An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,—

- (a) that the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained; or
- (b) that the source of the information is a publicly available publication; or

- (c) that the disclosure is to the individual concerned; or
- (d) that the disclosure is authorised by the individual concerned; or
- (e) that non-compliance is necessary—
 - (i) to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
 - (ii) for the enforcement of a law imposing a pecuniary penalty; or
 - (iii) for the protection of the public revenue; or
 - (iv) for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or
- (f) that the disclosure of the information is necessary to prevent or lessen a serious and imminent threat to—
 - (i) public health or public safety; or
 - (ii) the life or health of the individual concerned or another individual; or
- (g) that the disclosure of the information is necessary to facilitate the sale or other disposition of a business as a going concern; or
- (h) that the information—
 - (i) is to be used in a form in which the individual concerned is not identified; or
 - (ii) is to be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or
- (i) that the disclosure of the information is in accordance with an authority granted under section 54.

- (i) a person to whom section 15 or 16 of the Immigration Act 2009 applies (except if the person has been granted a visa or entry permission in accordance with section 17 of that Act); or
- (ii) a person obliged by or under that Act to leave New Zealand immediately or within a specified time; or
- (iii) treated for the purposes of that Act as being unlawfully in New Zealand

personal information means information about an identifiable individual; and includes information relating to a death that is maintained by the Registrar-General pursuant to the Births, Deaths, Marriages, and Relationships Registration Act 1995, or any former Act

public register has the meaning given to it in section 58

public register privacy principle has the meaning given to it in section 58

public sector agency—

- (a) means an agency that is a Minister, a department, an organisation, or a local authority; and
- (b) includes any agency that is an unincorporated body (being a board, council, committee, or other body)—
 - (i) which is established for the purpose of assisting or advising, or performing functions connected with, any public sector agency within the meaning of paragraph (a); and
 - (ii) which is so established in accordance with the provisions of any enactment or by any such public sector agency

publicly available information means personal information that is contained in a publicly available publication

publicly available publication means a magazine, book, newspaper, or other publication that is or will be generally available to members of the public; and includes a public register

responsible Minister means the Minister of Justice

- 114 Expiry of power to amend Schedule 5 by Order in Council**
Section 113 shall expire on 1 July 1997, but the expiration of that section shall not affect the validity of any Order in Council that has been made under that section and that is in force immediately before that date.

Section 114: amended, on 3 September 1996, by section 6(2) of the Privacy Amendment Act 1996 (1996 No 142).

Part 11A

Transfer of personal information outside New Zealand

Part 11A: inserted, on 8 September 2010, by section 8 of the Privacy (Cross-border Information) Amendment Act 2010 (2010 No 113).

114A Interpretation

In this Part, unless the context otherwise requires,—

OECD Guidelines means the Organisation for Economic Co-operation and Development Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data
State includes any State, territory, province, or other part of a country

transfer prohibition notice means a notice given under section 114B prohibiting the transfer of personal information from New Zealand to another State.

Section 114A: inserted, on 8 September 2010, by section 8 of the Privacy (Cross-border Information) Amendment Act 2010 (2010 No 113).

114B Prohibition on transfer of personal information outside New Zealand

- (1) The Commissioner may prohibit a transfer of personal information from New Zealand to another State if the Commissioner is satisfied, on reasonable grounds, that—
- (a) the information has been, or will be, received in New Zealand from another State and is likely to be transferred to a third State where it will not be subject to a law providing comparable safeguards to this Act; and
 - (b) the transfer would be likely to lead to a contravention of the basic principles of national application set out in

Part Two of the OECD Guidelines and set out in Schedule 5A.

- (2) In determining whether to prohibit a transfer of personal information, the Commissioner must also consider, in addition to the matters set out in subsection (1) and section 14, the following:
- (a) whether the transfer affects, or would be likely to affect, any individual; and
 - (b) the general desirability of facilitating the free flow of information between New Zealand and other States; and
 - (c) any existing or developing international guidelines relevant to transborder data flows, including (but not limited to)—
 - (i) the OECD Guidelines;
 - (ii) the European Union Directive 95/46/EC on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data.
- (3) Subsection (1) does not apply if the transfer of the information, or the information itself, is—
- (a) required or authorised by or under any enactment; or
 - (b) required by any convention or other instrument imposing international obligations on New Zealand.

Section 114B: inserted, on 8 September 2010, by section 8 of the Privacy (Cross-border Information) Amendment Act 2010 (2010 No 113).

114C Commissioner's power to obtain information

- (1) To enable the Commissioner to determine whether to prohibit a transfer of personal information, the Commissioner may hear or obtain information from such persons as the Commissioner considers necessary, and for this purpose Part 9 applies as if the Commissioner were carrying out an inquiry under section 13(1)(m).
- (2) In exercising his or her powers under subsection (1), the Commissioner may regulate his or her procedure in such manner as the Commissioner thinks fit.

Section 114C: inserted, on 8 September 2010, by section 8 of the Privacy (Cross-border Information) Amendment Act 2010 (2010 No 113).

114D Transfer prohibition notice

- (1) A prohibition under section 114B(1) is to be effected by the service of a transfer prohibition notice on the agency proposing to transfer the personal information concerned.
- (2) A transfer prohibition notice must—
 - (a) state the name of the agency to whom it relates; and
 - (b) describe the personal information concerned; and
 - (c) state that the transfer of the personal information concerned from New Zealand to a specified State is prohibited either—
 - (i) absolutely; or
 - (ii) until the agency has taken the steps stated in the notice to protect the interests of any individual or individuals affected by the transfer; and
 - (d) state the time when the notice takes effect; and
 - (e) state the ground for the prohibition; and
 - (f) state that the agency on whom the notice is served may lodge an appeal against the notice to the Human Rights Review Tribunal, and the time within which the appeal must be lodged.
- (3) The time when the notice takes effect under subsection (2)(d) must not be before the end of the period within which an appeal against the notice can be lodged.
- (4) If an appeal is brought, the notice does not take effect pending the determination or withdrawal of the appeal.
- (5) If the Commissioner, by reason of special circumstances, considers that the prohibition should take effect as a matter of urgency in relation to all or any part of the notice,—
 - (a) subsections (3) and (4) do not apply; and
 - (b) the notice takes effect on the sixth working day after the date on which the notice is served; and
 - (c) the notice must include—
 - (i) a statement that the Commissioner considers that the prohibition must take effect as a matter of urgency; and
 - (ii) a statement of the reasons why the Commissioner has reached that conclusion.

Compare: Data Protection Act 1988 s 11 (Ire)

Section 114D: inserted, on 8 September 2010, by section 8 of the Privacy (Cross-border Information) Amendment Act 2010 (2010 No 113).

114E Commissioner may vary or cancel notice

- (1) If, at any time, the Commissioner considers that all or any of the provisions of a transfer prohibition notice served on an agency need not be complied with in order to avoid a contravention of basic principles of privacy or data protection, the Commissioner may vary or cancel the transfer prohibition notice by serving notice to that effect on the agency concerned.
- (2) An agency on whom a transfer prohibition notice has been served may, at any time after the end of the period during which an appeal under section 114G(1)(a) can be lodged, apply in writing to the Commissioner for the notice to be varied or cancelled under subsection (1).
- (3) The Commissioner must, within 20 working days after the date on which an application under subsection (2) is received, notify the agency of—
 - (a) his or her decision; and
 - (b) his or her reasons, if the application is refused.
- (4) If the Commissioner exercises his or her discretion under subsection (1), the variation or cancellation of the transfer prohibition notice takes effect on the day after the date on which notice of the Commissioner's decision to vary or cancel the transfer prohibition notice is served.

Compare: Data Protection Act 1998 s 41 (UK)

Section 114E: inserted, on 8 September 2010, by section 8 of the Privacy (Cross-border Information) Amendment Act 2010 (2010 No 113).

114F Offence in relation to transfer prohibition notice

Every person who, without reasonable excuse, fails or refuses to comply with a transfer prohibition notice commits an offence and is liable on summary conviction to a fine not exceeding \$10,000.

Section 114F: inserted, on 8 September 2010, by section 8 of the Privacy (Cross-border Information) Amendment Act 2010 (2010 No 113).

114G Appeals against transfer prohibition notice

- (1) An agency on whom a transfer prohibition notice is served may appeal to the Human Rights Review Tribunal—
 - (a) against the whole or any part of the notice; or
 - (b) if the notice contains a statement by the Commissioner in accordance with section 114D(5)(c), against the decision to include that statement in respect of all or any part of the notice; or
 - (c) against the decision of the Commissioner to vary the notice in accordance with section 114E(1); or
 - (d) against the refusal of an application under section 114E(2) to vary or cancel the notice.
- (2) An appeal under subsection (1) must be lodged,—
 - (a) in the case of an appeal under subsection (1)(a) or (b), within 15 working days from the date on which the transfer prohibition notice was served on the agency concerned;
 - (b) in the case of an appeal under subsection (1)(c) or (d), within 15 working days from the date on which notice of the decision or refusal was served on the agency concerned.
- (3) The Tribunal must allow an appeal or substitute any other decision or notice that could have been made or served by the Commissioner if it considers that—
 - (a) the decision or notice against which the appeal is brought is not in accordance with the law; or
 - (b) to the extent that the decision or notice involved an exercise of discretion by the Commissioner, the Commissioner ought to have exercised his or her discretion differently.
- (4) The Tribunal may review any determination of fact on which the decision or notice in question was based.
- (5) On any appeal under subsection (1)(b), the Tribunal may—
 - (a) direct—
 - (i) that the notice in question must have effect as if it did not contain the statement that is mentioned in the notice; or
 - (ii) that the inclusion of the statement must not have effect in relation to any part of the notice; and

- (b) make any modifications required to give effect to that direction.

Compare: Data Protection Act 1998 ss 48, 49 (UK)

Section 114G: inserted, on 8 September 2010, by section 8 of the Privacy (Cross-border Information) Amendment Act 2010 (2010 No 113).

114H Application of Human Rights Act 1993

Section 87 and Part 4 of the Human Rights Act 1993 apply, with all necessary modifications (if any), in relation to proceedings under section 114G as if they were proceedings under that Act.

Section 114H: inserted, on 8 September 2010, by section 8 of the Privacy (Cross-border Information) Amendment Act 2010 (2010 No 113).

Part 12

Miscellaneous provisions

General

115 Protection against certain actions

- (1) Where any personal information is made available in good faith pursuant to principle 6,—
 - (a) no proceedings, civil or criminal, shall lie against the Crown or any other person in respect of the making available of that information, or for any consequences that follow from the making available of that information; and
 - (b) no proceedings, civil or criminal, in respect of any publication involved in, or resulting from, the making available of that information shall lie against the author of the information or any other person by reason of that author or other person having supplied the information to an agency.
- (2) The making available of, or the giving of access to, any personal information in consequence of a request made under principle 6 shall not be taken, for the purposes of the law relating to defamation or breach of confidence or infringement of copyright, to constitute an authorisation or approval of the publication of the document or of its contents by the individual

Chapter:	91	LEGAL AID ORDINANCE	Gazette Number	Version Date
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		Long title		30/06/1997
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To make provision for the granting of legal aid in civil actions to persons of limited means and for purposes incidental thereto or connected therewith.

[12 January 1967] L.N. 1 of 1967

(Originally 36 of 1966)

Part:	I	PRELIMINARY		30/06/1997
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Section:	1	Short title		30/06/1997
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This Ordinance may be cited as the Legal Aid Ordinance.

Section:	2	Interpretation	L.N. 230 of 2000	03/07/2000
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- (1) In this Ordinance, unless the context otherwise requires-
- "aided person" (受助人) means a person to whom has been granted a legal aid certificate which is still in force; (Amended 54 of 1984 s. 2)
- "assignment" and "assigned" (指派) include assignment of solicitor or counsel by the Director, selection of solicitor or counsel by an aided person and briefing of counsel by a solicitor;
- "contribution" (分擔費用) means the contribution payable under this Ordinance by an aided person or formerly aided person to the costs and expenses of legal aid; (Added 54 of 1984 s. 2)
- "counsel" (大律師) means a person who is enrolled as a barrister on the roll of barristers maintained in accordance with the provisions of the Legal Practitioners Ordinance (Cap 159), and who, at the material time, is not suspended from practice; (Amended 14 of 1982 s. 2; 79 of 1995 s. 50)
- "court" (法院) means any court, tribunal or person in respect of proceedings before which legal aid may be granted but does not include the Court of Final Appeal; (Amended 14 of 1982 s. 2; 79 of 1995 s. 50)
- "Director" (署長) means the Director of Legal Aid appointed under the provisions of section 3 and any Deputy Director of Legal Aid, Assistant Director of Legal Aid and Legal Aid Officer so appointed; (Amended 24 1983 s. 2; 54 of 1984 s. 2)
- "domestic proceedings" (家事法律程序) means proceedings under the Matrimonial Proceedings and Property Ordinance (Cap 192), the Matrimonial Causes Ordinance (Cap 179), the Guardianship of Minors Ordinance (Cap 13), the Separation and Maintenance Orders Ordinance (Cap 16) or the Parent and Child Ordinance (Cap 429); (Replaced 26 of 2000 s. 2)
- "financial resources" (財務資源) means financial resources as determined in the prescribed manner; (Added 27 of 1991 s. 2)
- "Fund" (計劃基金) means the Supplementary Legal Aid Fund established under section 29; (Added 54 of 1984 s. 2)
- "guardian" (監護人), in relation to an infant, includes, without prejudice to the generality of the expression, such person as the Director considers might properly be appointed by the court to be the next friend or guardian ad litem of the infant;
- "income" (收入), "disposable income" (可動用收入) and "disposable capital" (可動用資產) mean income, disposable income or disposable capital as determined in the prescribed manner; (Added 54 of 1984 s. 2)
- "infant" (幼年人) means an unmarried person who has not attained the age of 18 years; (Added 27 of 1991 s. 2)
- "judge" (法官) means a judge of the High Court or the District Court, as the case may be; (Amended 25 of 1998 s. 2)
- "legal aid" (法律援助) means legal aid granted under the provisions of this Ordinance;
- "legal aid certificate" (法律援助證書) means a legal aid certificate granted under section 10;

"Legal Aid Officer" (法律援助主任) means an officer appointed to a post of and serving as, or lawfully performing the functions of any of the officers designated in Schedule 1; (Added 24 of 1983 s. 2)

"order for costs" (繳付訟費命令) includes any judgment, order, decree, award or direction by a court or the Court of Final Appeal for the payment of the costs of one party in the proceedings by another party, whether given or made in those proceedings or not; (Amended 14 of 1982 s. 2; 79 of 1995 s. 50)

"panel" (名冊) means the appropriate panel maintained in accordance with section 4;

"person" (人、人士) does not include a body of persons corporate or unincorporate so as to authorize legal aid to be granted to such a body;

"prescribed" (訂明) means prescribed by regulations made under section 28; (Added 54 of 1984 s. 2)

"proceedings" (法律程序) includes-

- (a) legal proceedings;
- (b) negotiations prior to the issue of legal proceedings, including mediation, and for the payment of compensation by the Motor Insurers' Bureau for which no legal proceedings are issued;
- (c) an application to the Mental Health Review Tribunal; (Added 43 of 1995 s. 2)

"Registrar" (司法常務官) means the Registrar of the High Court and, for the purposes of any proceedings before the Court of Final Appeal, includes the Registrar of the Court of Final Appeal; (Added 14 of 1982 s. 2. Amended 79 of 1995 s. 50; 25 of 1998 s. 2)

"solicitor" (律師) means a person enrolled on the roll of solicitors maintained in accordance with the provisions of the Legal Practitioners Ordinance (Cap 159), and who, at the material time, is not suspended from practice; (Amended 14 of 1982 s. 2; 54 of 1984 s. 2; 79 of 1995 s. 50)

"Supplementary Legal Aid Scheme" (法律援助輔助計劃) means the provisions under this Ordinance for the grant of legal aid where section 5A applies; (Added 54 of 1984 s. 2)

"transcript" (謄本) includes the transcript of the official shorthand note and any official typescript of the judge's manuscript note. (Added 54 of 1984 s. 2. Amended 79 of 1995 s. 50)

(Amended 79 of 1995 s. 50)

(2) Any references in this Ordinance to proceedings, an application, an order or a decision relating to or in connection with an appeal to, or an application for leave to appeal to, the Court of Final Appeal shall include proceedings, applications, orders and decisions relating to or in connection with any opposition to such an appeal or application for leave to appeal. (Added 14 of 1982 s. 2. Amended 79 of 1995 s. 50)

(3) The Chief Executive may, by order, amend Schedule 1. (Added 24 of 1983 s. 2. Amended 26 of 1999 s. 3)

Section:	3	Appointments	L.N. 87 of 2003	28/03/2003
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(1) The Chief Executive may appoint a person to be the Director of Legal Aid and may also appoint such number of Deputy Directors of Legal Aid, Assistant Directors of Legal Aid and Legal Aid Officers as he may think fit. (Amended 24 of 1983 s.3; 26 of 1999 s. 3)

(2) No person shall be appointed to be, or shall act temporarily as, the Director of Legal Aid or a Deputy Director of Legal Aid or an Assistant Director of Legal Aid or a Legal Aid Officer unless he is qualified to practise as a legal practitioner in Hong Kong, the United Kingdom or in a jurisdiction listed in Schedule 2 to the Legal Officers Ordinance (Cap 87). (Amended 24 of 1983 s. 3; 27 of 1991 s. 3; 42 of 2000 s. 28)

(3) Every person holding an appointment under subsection (1) shall, when performing any duty or exercising any power under this Ordinance or under rules made pursuant to section 9A of the Criminal Procedure Ordinance (Cap 221), have all the rights, powers, privileges, and duties of a barrister and solicitor duly admitted under the Legal Practitioners Ordinance (Cap 159), including a right of audience before any court or the Court of Final Appeal: (Amended 79 of 1995 s. 50)

Provided that no such person shall undertake or conduct as counsel the case for a defendant at the trial of such defendant in any criminal cause or matter or conduct any appeal on behalf of any such defendant in any criminal cause or matter. (Replaced 58 of 1972 s.2. Amended 48 of 1983 s.2)

(4) Notification in the Gazette to the effect that a person has been appointed to any of the offices referred to in subsection (1), or has ceased to hold any such office, shall be sufficient proof of the facts stated in the notice. (Added 58 of 1972 s.2)

Section:	22A	Power of the Legislative Council to make amendments		30/06/1997
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The Legislative Council may, by resolution, amend-

- (a) the rate of maintenance payments specified in section 18A(5); and
- (b) the amount specified in the proviso to section 19B(1)(a).

(Added 8 of 1997 s. 6)

Part:	V	MISCELLANEOUS	L.N. 230 of 2000	03/07/2000
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Section:	23	Proceedings for misrepresentations, etc.	L.N. 230 of 2000	03/07/2000
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(1) Any person seeking or receiving legal aid who-

- (a) wilfully fails to comply with any regulations as to the information to be supplied by him; or
- (b) in furnishing any information required by such regulations knowingly makes any false statement or false representation,

shall be guilty of an offence and liable on summary conviction to a fine at level 3 and to imprisonment for 6 months. (Amended 26 of 2000 s. 7)

(2) Any proceedings for an offence under subsection (1) may, notwithstanding any law prescribing the time within which such proceedings may be brought, be brought within 2 years after the commission of the offence or within 1 year next after the first discovery thereof by the prosecutor, whichever is the shorter.

(Amended 54 of 1984 s. 22)

Section:	24	Privileges attaching to certain relationships	L.N. 312 of 1998	11/09/1998
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(1) The like privileges and rights as those which arise from the relationship of client, counsel and solicitor acting in their professional employment shall arise from the following relationships, that is to say-

- (a) the relationship between an applicant for legal aid and the Director and counsel and solicitor to whom the application is referred;
- (b) the relationship between an aided person and the Director and counsel and solicitor assigned to act for him in any proceedings to which a legal aid certificate relates.

(2) (Repealed 27 of 1991 s. 15)

(3) Save as provided by this Ordinance, the rights conferred by this Ordinance on an aided person shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised.

(4) A person shall not disclose information given for the purposes of this Ordinance concerning a person seeking or receiving advice, assistance or representation otherwise than-

- (a) to enable the proper performance by a person of a function under this Ordinance;
- (b) to advise on, institute and pursue criminal proceedings for an offence arising out of the operation of this Ordinance or to report the proceedings; or
- (c) with the consent of the person concerned and, if he did not give the information, the consent of the person who did. (Added 43 of 1995 s. 9)

(5) Subsection (4) does not apply to information in the form of a summary or collection of information set out in a manner that does not enable information concerning a particular person to be ascertained from it. (Added 43 of 1995 s. 9)

(6) Information given to counsel or a solicitor acting in that capacity by or on behalf of a person seeking or receiving advice, assistance or representation under this Ordinance is not information given for the purposes of this Ordinance. (Added 43 of 1995 s. 9)

(7) In this section, "court" (法院) includes the Court of Final Appeal. (Added 79 of 1995 s. 50. Amended L.N. 312 of 1998)

Chapter:	87	LEGAL OFFICERS ORDINANCE	Gazette Number	Version Date
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		Long title		30/06/1997
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To consolidate and amend the law relating to the right of officers of the legal departments of Government to practise as barristers and solicitors for certain purposes and to recover fees and costs in respect of work done and generally to regulate the status rights privileges and duties of such officers.

[10 March 1950]

(Originally 3 of 1950 (Cap 87 1950))

Section:	1	Short title		30/06/1997
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This Ordinance may be cited as the Legal Officers Ordinance.

Section:	2	Interpretation	L.N. 87 of 2003	28/03/2003
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In this Ordinance, unless the context otherwise requires-

"duly admitted" (妥為認許) means duly approved, admitted and enrolled as a barrister or solicitor under the Legal Practitioners Ordinance (Cap 159);

"legal officer" (律政人員) means an officer appointed to and serving in Hong Kong as a legal officer, or an officer lawfully performing the functions of any of the officers designated in Schedule 1; (Amended 11 of 1999 s. 3; 42 of 2000 s. 22)

"public body" (公共機構) includes any executive, legislative, municipal, or urban council, any Government department or undertaking, any local or public authority or undertaking, any board, commission, committee or other body whether paid or unpaid appointed by the Chief Executive or the Government or which has power to act in a public capacity under or for the purposes of any enactment; (Amended 11 of 1999 s. 3)

"public servant" (公務員) means in addition to the meaning assigned to it by the Interpretation and General Clauses Ordinance (Cap 1), any employee or member of a public body as defined in this Ordinance, whether temporary or permanent and whether paid or unpaid;

"rights" (權利) includes powers, privileges and discretions;

"tribunal" (審裁處) includes any council, committee, arbitrator, body or person before which a barrister or solicitor may lawfully appear.

Section:	2A	Appointment qualification	L.N. 87 of 2003	28/03/2003
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No person shall be appointed as a legal officer unless he has been admitted as a legal practitioner in Hong Kong, the United Kingdom or in a jurisdiction listed in Schedule 2.

(Added 47 of 1989 s. 2. Amended 42 of 2000 s. 23)

Section:	3	Rights and privileges of a legal officer	L.N. 87 of 2003	28/03/2003
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(1) Any legal officer shall in respect of any of the matters mentioned in section 4(1) have all the rights of barristers and solicitors duly admitted under the provisions of the Legal Practitioners Ordinance (Cap 159).

(2) For the avoidance of doubt and without prejudice to the generality of subsection (1) a legal officer shall in respect of any of the matters mentioned in section 4(1) have a right of audience before any court or tribunal.

(3) Notification in the Gazette to the effect that a person has been appointed to or holds any of the offices designated in Schedule 1 or has relinquished or no longer holds any of the said offices, shall be sufficient proof of the facts therein stated. (Amended 42 of 2000 s. 24)