



## Personal Data (Privacy) (Amendment) Bill 2011

### Law Society's submissions

The Law Society has the following submissions on the Personal Data (Privacy) (Amendment) Bill 2011:-

#### 1. Clause 6 -- New Section 13(4)(d)

The current Section 13(4) already defines “specified body” to mean (a) a magistrate, (b) a court, or (c) the Administrative Appeals Board. Why is there a need to specifically add “the chairman of the Administrative Appeals Board” to the definition?

#### 2. Clause 8 -- New Section 14A(6)

The new Section 14A provides for notices to be given by the Commissioner in subsections (1) and (4). The offence in subsection (6) should be extended to cover the notice given by the Commissioner in subsection (4). Accordingly, we suggest that the new Section 14A(6) should be revised to read:-

“(6) A person who, in purported compliance with a notice under subsection (1) or (4), knowingly or recklessly provides any document, record, information or thing, or any response to any question, which is false or misleading in a material particular, commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months.”

#### 3. Clause 11 – New Section 18(5)

The *mens rea* for the new offence should be “knowingly or recklessly”, like other offences under the Ordinance. Accordingly, it is suggested that the new Section 18(5) should be revised to read:-

- “(5) A person commits an offence if the person, in a data access request, knowingly or recklessly, supplies any information which is false or misleading in a material particular for the purposes of having the data user –
- (a) informing the person whether the data user holds any personal data which is the subject of the request; and
  - (b) if applicable, supplying a copy of the data.”

#### 4. Clause 17 – New Section 26

Erasure of data is subject to practical limits, for example, in the case of shared servers or cloud computing. Further, recovery of erased data is possible unless the disk holding the data is physically destroyed – and frequently it is not possible to destroy a disk because it also contains other data. We welcome the proposed substitution of “must take all practicable steps to” in Section 26(1) and Section 26(2)(a). Accordingly, we suggest the following amendments:-

##### Section 26(1)

Repeal “shall” and substitute “must take all practicable steps, having regard to practical and technological limitations the data user faces, to”.

##### Section 26(2)(a)

Repeal “shall” and substitute “must take all practicable steps, having regard to practical and technological limitations the data user faces, to”.

#### 5. Clause 18 – New Section 31(4)

The *mens rea* for the new offence should be “knowingly or recklessly”, like other offences under the Ordinance. Accordingly, it is suggested that the new Section 31(4) should be revised to read:-

- “(4) A data user who, in a matching procedure request made under subsection (1), knowingly or recklessly, supplies any information which is false or misleading in a material particular for the purpose of obtaining the Commissioner’s consent to the carrying out of the matching procedure to which the request relates, commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months.”

## 6. Clause 21 – New Section 35A

We suggest that the definition of “sell” should not be limited to “gain in money or other property”, for there may be intangible gains such as business opportunity, business relationship, etc. which may cause a data user to provide the data to another person.

Accordingly we suggest that the definition of “sell” be amended to:-

“*sell* (售賣), in relation to personal data, means to provide the data to a person for gain in money or other property or other tangible or intangible benefit, irrespective of whether –

- (a) the gain is contingent on any conditions; or
- (b) the provider retains possession of the data; “

## 7. Clause 21 – New Section 35B

The response facility in the new Section 35B(4) should correspond with the information to be provided with the data user under the new Section 35B(3)(a). The information and response facility provided under the new Section 35B(3) should be easily readable and easily understandable by the data subject. Accordingly, we suggest the following amendment to the new Section 35B(4):-

- “(4) A response facility under subsection 3(b) may provide means that allow a data subject to indicate in writing whether the data subject objects to the intended sale, with reference to –
  - (a) any specified kind of data to be used;
  - (b) any specified class of persons to which the data is to be sold; or
  - (c) any specified class of marketing subjects in relation to which the data is to be used, if applicable.
- (5) The information and response facility provided under subsection (3) must be presented in a manner that is easily readable and easily understandable by the data subject.”

## 8. Clause 21 – New Section 35C

The commercial reality nowadays is that it is very common for businesses to set up special purpose vehicles to carry out particular segments of the business. For example, a bank may set up a subsidiary to carry out credit card business, and another subsidiary to carry out insurance business, etc. It is suggested that an “intra-group exemption” be written into the new Section 35C to allow flexibility for transfer of data within a group of companies.

## 9. Clause 21 – New Section 35G

As circumstances of society may change and there may be need to expand the “exceptions” to application of the new Division 3, it is suggested that a further exception be added to the new Section 35G. Accordingly, we suggest the following amendment:-

### “35G Application

This Division does not apply in relation to the offering, or advertising of the availability, of –

- (a) social services run, subvented or subsidized by the Social welfare Department;
- (b) health care services provided by the Hospital authority or Department of Health; ~~or~~
- (c) any other social or health care services which, if not provided, would be likely to cause serious harm to the physical or mental health of –
  - (i) the person to whom the services are intended to be provided; or
  - (ii) any other individual; or
- (d) any other circumstances specified by the Commissioner from time to time.

## 10. Clause 21 – New Section 35H

The response facility in the new Section 35H(4) should correspond with the information to be provided with the data user under the new Section 35H(3)(a). The information and response facility provided under the new Section 35H(3) should be easily readable and easily understandable by the data subject. Accordingly, we suggest the following amendments to the new Section 35H(4) and (5):-

- “(4) A response facility under subsection 3(b) may provide means that allow a data subject to indicate in writing whether the data subject objects to the intended use, with reference to –
  - (a) any specified kind of data to be used; or
  - (b) any specified class of marketing subjects in relation to which the data is to be used.
- (5) The information and response facility provided under subsection (3) must be presented in a manner that is easily readable and easily understandable by the data subject.”

### **11. Clause 21 – New Section 35N**

The response facility in the new Section 35N(4) should correspond with the information to be provided with the data user under the new Section 35N(3)(a). The information and response facility provided under the new Section 35N(3) should be easily readable and easily understandable by the data subject. Accordingly, we suggest the following amendments to the new Section 35N(4) and (5):-

- “(4) A response facility under subsection 3(b) may provide means that allow a data subject to indicate in writing whether the data subject objects to the intended provision, with reference to –
- (a) any specified kind of data to be provided;
  - (b) any specified class of persons to which the data is to be provided; or
  - (c) any specified class of marketing subjects in relation to which the data is to be used.
- (5) The information and response facility provided under subsection (3) must be presented in a manner that is easily readable and easily understandable by the data subject.”

### **13. Clause 21 – New Section 35R(2)(b)**

The new Section 35R creates an offence which, even if the discloser does not have any intent to do harm, actually causes psychological harm to the data subject. In such circumstances the “harm” to the data subject must be very clearly defined. We suggest a more detailed definition of the harm should be included in the new Section 35R(2), otherwise an offence could be committed by a disclosure without the data user’s consent where the data subject suffers only mild embarrassment.

### **14. Clause 28 – New Section 50A**

Regarding the new Section 50A(1), we suggest that for the sake of clarity, the enforcement notice should be stated to be under Section 50(1).

Regarding the new Section 50A(3), we cannot locate “section 50(1A)(b) and believe this to be an error.

Accordingly, we suggest that the new Section 50A(1) and (3) be amended as follows:-

**“50A. Offences relating to enforcement notices**

- (1) A data user who contravenes an enforcement notice under Section 50(1) commits an offence .....
- (2) .....
- (3) A data user who, having complied with an enforcement notice, intentionally does the same act or makes the same omission in contravention of the requirement under this Ordinance, as specified in the enforcement notice under section ~~50(1A)(b)~~50(1), commits an offence .....

**15. Clause 34 – New Section 63B**

In our comments on the new section 35C above, we pointed out the commercial reality that it is common for businesses to set up special purpose vehicles to carry out particular segments of the business and hence there is a need to allow flexibility for transfer of data within a group of companies. Another commercial reality is that businesses frequently sell only a part of rather than the whole of its business.

To cater for such commercial realities, we suggest making the following amendments to the new Section 63B(1) and (2):-

**“63B. Due diligence exercise**

- (1) Personal data transferred or disclosed by a data user for the purpose of a due diligence exercise to be conducted in connection with a proposed business transaction that involves --
  - (a) a transfer of all or any part of the business or property of, or any shares in, the data user;
  - (b) a change in the shareholdings of the data user or a related company; or
  - (c) an amalgamation of the data user or a related company with another body,

is exempt from the provisions of data protection principle 3 if each of the conditions specified in subsection (2) is satisfied.

- (2) The conditions are –
  - (a) the personal data transferred or disclosed is not more than necessary for the purpose of the due diligence exercise;

- (b) goods, facilities or services which are the same as or similar to those provided by the data user to the data subject are to be provided to the data subject, on completion of the proposed business transaction, by a party to the transaction or another company in the same group of companies or a new body formed as a result of the transaction.”

**The Law Society of Hong Kong**

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