

Bills Committee on Personal Data (Privacy) (Amendment) Bill 2011

Views of deputations on individual clauses of the Bill

Clause/ section	Deputations' views
New Section 11A	<p><u>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <p>The immunity applies in favour of the Privacy Commissioner or a prescribed officer where he performs any function or exercises any power in good faith. In order to put this beyond doubt, please revise new Section 11A(1) as marked in the following: ".....anything done or omitted to be done by the person or officer in good faith in the performance or purported performance of any function, or <u>in</u> the exercise or purported exercise of any power, imposed or conferred on the Commissioner or officer under this Ordinance".</p>
Clause 6 –New Section 13(4)d	<p><u>The Law Society of Hong Kong [LC Paper No. CB(2)416/11-12(01)]</u></p> <p>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?</p>
New Section 14A	<p><u>Hong Kong Retail Management Association [LC Paper No. CB(2)416/11-12(02)]</u></p> <p>The Privacy Commissioner can verify the accuracy of data user returns. A new section 14A provides that the Commissioner may require a data user to provide <u>any document, record, information or thing</u> specified in the notice and to respond in writing to <u>any question</u> specified in the notice for this purpose. Clear rules of engagement are required so that data users can have a reasonable chance to comply. This requires clarity and guidelines on the type of document, record, information or thing that may be included. e.g. "Optional Information" proposed in the Consultation Document.</p>

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Clause 8 --New Section 14A(6)	<p data-bbox="465 220 1507 256"><u>The Law Society of Hong Kong [LC Paper No. CB(2)416/11-12(01)]</u></p> <p data-bbox="465 304 2022 427">The new Section 14A provides for notices to be given by the Privacy 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, the new Section 14A(6) should be revised to read:-</p> <p data-bbox="524 475 2022 643">"(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."</p>
	<p data-bbox="465 695 1608 732"><u>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <ol data-bbox="465 780 2022 1337" style="list-style-type: none"><li data-bbox="465 780 2022 948">1. It is appropriate to maintain status quo and rely on the existing Section 64(1) of the Personal Data (Privacy) Ordinance ("PDPO") which makes it an offence for a data user knowingly or recklessly to supply false or misleading information to the Privacy Commissioner. A similar mechanism applies under the Banking Ordinance and the Securities and Futures and Ordinance.<li data-bbox="465 995 2022 1337">2. In any event, new Section 14A should expressly provide for the power to be exercised by the Privacy Commissioner in a reasonable manner. The power conferred on the Hong Kong Monetary Authority and the Securities and Futures Commission to require production of documents or information by relevant persons for the purposes of performing their regulatory functions (including conducting investigations) is subject to similar reasonableness requirement. The Privacy Commissioner should be subject to the same reasonableness requirement as the financial regulators. A reasonableness requirement is incorporated in respect of the Privacy Commissioner's power under Section 15(3) of the PDPO. <p data-bbox="524 1385 2022 1422">Further, the exemption from compliance specified in new Section 14A(3) is too narrow.</p> <ol data-bbox="465 1469 1536 1506" style="list-style-type: none"><li data-bbox="465 1469 1536 1506">3. Accordingly, new Section 14A should be revised as marked below:

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	<p>(1) For the purpose of verifying the accuracy of information in a data user return submitted under section 14, the Commissioner may, by written notice, require any of the persons specified in subsection (2) –</p> <ul style="list-style-type: none">(a) to provide any document, record, information or thing <u>reasonably</u> specified in the notice; and(b) to respond in writing to any question <u>reasonably</u> specified in the notice, <u>which the Commissioner has reasonable grounds to believe to be relevant for the purpose of verifying the accuracy of information in a data user return submitted under section 14.</u> <p>(2) The persons are –</p> <ul style="list-style-type: none">(a) the data user; and(b) any other person whom the Commissioner has reasonable grounds to believe may be able to assist in verifying any information in the data user return. <p>(3) A person on whom a notice is served under subsection (1) may refuse to provide any document, record, information or thing, or any response to any question, specified in the notice, if the person is <u>permitted</u>, entitled or obliged under this or any other Ordinance, <u>any legal or regulatory requirement or any direction or order of any regulatory authority or court to which that person is subject</u> to do so.</p> <p>(4) If, having regard to any document, record, information or thing, or any response to any question, provided under subsection (1), the Commissioner <u>reasonably</u> considers that any information in a data user return is inaccurate, the Commissioner may, by written notice, require the data user to correct the information in the data user return.</p>

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	<p>(5) Subject to subsection (3), a person on whom a notice is served under subsection (1) or (4) must comply with the requirement within the period <u>reasonably</u> specified in the notice.</p> <p>(6) A person who, in purported compliance with a notice under subsection (1), 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."</p>
<p>Clause 11 –New Section 18(5)</p>	<p><u>The Law Society of Hong Kong [LC Paper No. CB(2)416/11-12(01)]</u></p> <p>The <i>mens rea</i> 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:-</p> <p>"(5) A person commits an offence if the person, in a data access request, <u>knowingly or recklessly</u>, supplies any information which is false or is leading in a material particular for the purposes of having the data user –</p> <p>(a) informing the person whether the data user holds any personal data which is the subject of the request; and</p> <p>(b) if applicable, supplying a copy of the data."</p>
<p>New Section 20(3)(ea)</p>	<p><u>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <p>New Section 20(3) should be revised as marked below:</p> <p>"(ea) the data user is <u>permitted, entitled or obliged</u> under this or any other Ordinance, <u>any legal or regulatory requirement or any direction or order of any regulatory authority or court to which the data</u></p>

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	<p><u>user is subject</u> not to disclose the personal data which is the subject of the request; or"</p>
<p>New Section 20(5)</p>	<p><u>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <p>Please revise new Section 20(5)(a) as marked in the following: ".....whether a data user is <u>permitted</u>, required or entitled to refuse to comply with a data access request.....".</p>
<p>Clause 17 New Section 26</p>	<p><u>The Law Society of Hong Kong [LC Paper No. CB(2)416/11-12(01)]</u></p> <p>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:-</p> <p style="padding-left: 40px;">Section 26(1)</p> <p style="padding-left: 40px;">Repeal "shall" and substitute "must take all practicable steps, <u>having regard to practical and technological limitations the data user faces,</u> to"</p> <p style="padding-left: 40px;">Section 26(2)(a)</p> <p style="padding-left: 40px;">Repeal "shall" and substitute "must take all practicable steps, <u>having regard to practical and technological limitations the data user faces,</u> to"</p>
<p>Clause 18 –New Section 31(4)</p>	<p><u>The Law Society of Hong Kong [LC Paper No. CB(2)416/11-12(01)]</u></p> <p>The <i>mens rea</i> 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:-</p> <p>"(4) A data user who, in a matching procedure request made under subsection (1), <u>knowingly or</u></p>

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	<p><u>recklessly</u>, 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."</p>
Section 32(5)	<p><u>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <p>This point is new and was not covered in the consultation. The proposed new Section 32(5) should be considered carefully as it provides that a data user commits an offence if it contravenes any condition subject to which the Privacy Commissioner consents to its matching procedure request.</p> <p>The usual consequence for breaching a condition subject to which a consent or approval is given is the suspension or revocation of the relevant consent or approval. That may, in turn, result in the commission of an offence if the person to whom the consent or approval was given continued to act without valid consent or approval.</p> <p>It is appropriate to adopt the usual consequence in this case and we would suggest revising Section 32(5) as marked below:</p> <p>"(5) <u>The Commissioner may suspend or revoke any consent given in a notice under subsection (1)(b)(i) if a</u> A requestor who carries out a matching procedure in contravention of any conditions specified in <u>that a notice under subsection (1)(b)(i) commits an offence and is liable on conviction to a fine at level 3.</u>"</p> <p>Even if our suggestion is not accepted, the new Section 32(5) should be revised for the sake of clarity as marked below:</p> <p>"(5) A requestor who <u>carries out a matching procedure in contravention of</u> contravenes any conditions specified in a notice under subsection (1)(b)(i) commits an offence and is liable on conviction to a fine a level 3."</p>

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<p>Clause 21 – New Section 35A</p>	<p><u>The Law Society of Hong Kong [LC Paper No. CB(2)416/11-12(01)]</u></p> <p>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:-</p> <p style="padding-left: 40px;"><i>"sell (售賣)</i>, in relation to personal data, means to provide the data to a person for gain in money or other property <u>or other tangible or intangible benefit</u>, irrespective of whether –</p> <p style="padding-left: 40px;">(a) the gain is contingent on any conditions; or</p> <p style="padding-left: 40px;">(b) the provider retains possession of the data.</p> <p><u>Hong Kong Retail Management Association [LC Paper No. CB(2)416/11-12(02)]</u></p> <p>The definition of “sell” means to provide data to a person for “gain in money or <u>other property</u>”. We are concerned that the inclusion of the words “other property” in the definition of “sell” makes the definition too broad and that it may inadvertently prevent standard business practices. For example, many promotions involve many parties (such as retailers/banks), and such promotions are designed to provide some “gain” or benefits to the participants.</p>
<p>Clause 21 –New Section 35B</p>	<p><u>Hong Kong Retail Management Association [LC Paper No. CB(2)416/11-12(02)]</u></p> <p>It is not clear how section 35B (sale of personal data) can be distinguished from section 35N provision (otherwise than by sale) of personal data to persons for use in direct marketing. For example section 35N provides that “a data user who intends to provide, otherwise than by sale, any personal data of a data subject to a person for use in direct marketing <u>for that person’s own purposes</u> must take the action specified in subsection (3).” What is the meaning of “for that person’s own purposes” and is for “gain in money or <u>other property</u>” relevant? We recommend that this should be clarified.</p>

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	<p data-bbox="465 220 1505 258"><u>The Law Society of Hong Kong [LC Paper No. CB(2)416/11-12(01)]</u></p> <p data-bbox="465 306 2020 475">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):-</p> <p data-bbox="555 523 2020 603">"(4) A response facility <u>under subsection 3(b)</u> may provide means that allow a data subject to indicate in writing whether the data subject objects to the intended sale, with reference to –</p> <ul data-bbox="658 651 2020 906" style="list-style-type: none"><li data-bbox="658 651 1308 689">(a) any specified kind of data <u>to be used</u>;<li data-bbox="658 737 1706 775">(b) any specified class of persons <u>to which the data is to be sold</u>; or<li data-bbox="658 823 2020 906">(c) any specified class of marketing subjects <u>in relation to which the data is to be used, if applicable</u>. <p data-bbox="555 954 2020 1034">(5) The information and response facility provided under subsection (3) must be presented in a manner that is easily readable and easily understandable <u>by the data subject</u>."</p>
	<p data-bbox="465 1088 1608 1126"><u>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <p data-bbox="465 1174 1491 1212">We propose the changes marked below for clarity and practicability:</p> <ol data-bbox="465 1260 1872 1468" style="list-style-type: none"><li data-bbox="465 1260 1872 1340">1. Section 35B(3) "(3) The data user must <u>take all practicable steps to provide the data subject with.....</u>";<li data-bbox="465 1388 1966 1468">2. Section 35B(3)(b) "(b) a <u>response</u> facility through which the data subject may objects to the intended sale."

Clause/ section	Deputations' views
	<p>3. Section 35B(5) "(5) The information and response facility provided under subsection (3) must be presented in a manner that is easily readable and easily understandable <u>by the standards of a reasonable, average person.</u>";</p> <p>4. Section 35B(7) "(7) In any proceedings for an offence under subsection (6), it is a defence for the data user charged to prove that the data user took all <u>practicable steps</u> reasonable precautions and exercised all due diligence to avoid the commission of the offence.";</p>
<p>Clause 21 –New Section 35C</p>	<p><u>The Law Society of Hong Kong [LC Paper No. CB(2)416/11-12(01)]</u></p> <p>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.</p> <hr/> <p><u>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <p>Section 35C(3) "(3) A data subject may indicate whether the data subject objects to a sale of personal data through the response facility or other means <u>as the data user may reasonably specify.</u>";</p> <p>Section 35C(5) The wording describing the defence in the above revised in the same manner as set out in the proposed changes for Section 35B(7).</p>

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Section 35D	<p data-bbox="465 220 1608 258"><u>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <p data-bbox="465 306 698 344">Section 35D(1)</p> <p data-bbox="510 351 2024 472">"(1) the data subject may subsequently object to such sale by sending a written notification to the data user <u>through the response facility or other means as the data user may reasonably specify.</u>";</p> <p data-bbox="465 520 698 558">Section 35D(3)</p> <p data-bbox="510 564 2024 730">"(3) A data user must, without charge to a data subject, comply with the requirement specified in a notification from the data subject under subsection (1). <u>For the avoidance of doubt, a data user is deemed to have complied with this subsection (3) if the data user does more than the data subject specified in the notification.</u>"; and</p> <p data-bbox="465 778 698 817">Section 35D(7)</p> <p data-bbox="645 823 2024 903">The wording describing the defence in the above sections should be revised in the same manner as set out in the proposed changes for section 35B(7).</p> <p data-bbox="465 951 2024 1031">We would also take this opportunity to re-iterate our strong support for an opt-out approach over an opt-in approach having regard to the major shortcomings of an opt-in approach as set out below:</p> <ul data-bbox="465 1078 2024 1505" style="list-style-type: none"><li data-bbox="465 1078 2024 1206">(i) data subjects must actively engage in an opt-in approach. This approach may not work for data subjects who prefer a hassle-free approach. Other data subjects may fail to respond for other reasons including that they may not understand the opt-in approach and confirmation process;<li data-bbox="465 1254 2024 1420">(ii) an opt-in approach which provides for data subjects to opt-in on a case-by-case basis or a complicated opt-in approach does not serve the interest of data subjects. If the model is not user-friendly, data subjects may not react to it and there is a further risk of desensitizing data subjects if they are bombarded with opt-in requests thereby rendering the initiative ineffective;<li data-bbox="465 1468 2024 1505">(iii) requiring data subjects to opt-in on a case-by-case basis will be overly burdensome on data users

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	<p>and impossible to administer and upkeep in practice; and</p> <p>(iv) the brunt of the opt-in requirement will be borne by data users especially if the requirement applies with retrospective effect to personal data already collected from data subjects. This will create an unbearable burden on costs and resources on data users.</p> <p>Further, giving data subjects the right to opt-out any time should afford sufficient and appropriate protection to data subject.</p>
Section 35F	<p><u>Hong Kong Retail Management Association [LC Paper No. CB(2)416/11-12(02)]</u></p> <p>Section 35F allows the Chief Executive to grant exemptions conditionally or unconditionally to any class of data user or any kind of personal data. We recommend that criteria should be set out to make it clear in what circumstances the powers should be exercised.</p>
Clause 21 –New Section 35G	<p><u>The Law Society of Hong Kong [LC Paper No. CB(2)416/11-12(01)]</u></p> <p>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:-</p> <p>"35G Application</p> <p>This Division does not apply in relation to the offering, or advertising of the availability, of –</p> <p>(a) social services run, subvented or subsidized by the Social Welfare Department;</p> <p>(b) health care services provided by the Hospital Authority or Department of Health; or</p> <p>(c) any other social or health care services which, if not provided, would be likely to cause</p>

Clause/ section	Deputations' views
	<p>serious harm to the physical or mental health of –</p> <p>(i) the person to whom the services are intended to be provided; or</p> <p>(ii) <u>any other individual;</u> or</p> <p>(d) <u>any other circumstances specified by the Commissioner from time to time.</u></p>
<p>Sections 35G to 35Q</p>	<p><u>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <p>We propose to make corresponding changes to Sections 35H, 35J, 35K, 35L(4), 35N, 35O and 35P as set out above in relation to Sections 35B to 35F.</p> <p>We repeat our views above regarding the opt-out approach. We would also like to add that in the case of Hong Kong Association of Banks member banks, in conducting direct marketing for the first time, they will remind customers of their rights to opt-out and provide convenient channels (such as visiting branches, by e-mail or phone) for the customers to perform the opt-out request.</p>
<p>Clause 21 New Section 35H</p>	<p><u>The Law Society of Hong Kong [LC Paper No. CB(2)416/11-12(01)]</u></p> <p>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):-</p> <p>"(4) A response facility <u>under subsection 3(b)</u> may provide means that allow a data subject to indicate in writing whether the data subject objects to the intended use, with reference to –</p> <p>(a) any specified kind of data <u>to be used</u>; or</p>

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	<p>(b) any specified class of marketing subjects <u>in relation to which the data is to be used.</u></p> <p>(5) The information and response facility provided under subsection (3) must be presented in a manner that is easily readable and easily understandable <u>by the data subject.</u>"</p>
	<p><u>Hong Kong Retail Management Association [LC Paper No. CB(2)416/11-12(02)]</u></p> <p>We are concerned about the implications of section 35H (4) which seems to require data users to give data subjects the option to agree to some elements of data usage, but not others (e.g. in relation to specific kind of data or specific class of data subjects). This will be unworkable in practice as businesses would have to provide tailor-made marketing programmes for each customer's requirements.</p> <p><u>Office of the Privacy Commissioner for Personal Data [LC Paper No. CB(2)263/11-12(01)]</u></p> <p><i>Delayed Notification</i></p> <p>The new section 35H (under clause 21) of the Amendment Bill requires data users to inform data subjects by providing certain written information before using their personal data in direct marketing. Data users will have to provide a response facility to data subjects for them to exercise their opt-out right. Data subjects, who do not respond to the data users' response facility within the prescribed 30-days period will, pursuant to section 35J (2)(b), be deemed not to have opted-out. There are crucial flaws in this proposed regime.</p> <p>While Data Protection Principle ("DPP") 1(3) in Schedule 1 of the Ordinance requires the purpose of the use of the data (direct marketing or otherwise) to be made known to the data subject <i>on or before</i> collecting the data, the proposed notification arrangement legitimizes the data users to delay informing the data subjects until any time after data collection that the data are to be used for direct marketing purposes. With this delayed approach, the data user's notification can take place at any un-predetermined time after data collection. In addition, it would be incumbent on the data subjects to make specific opt-out requests in response to the notification or else the deeming rule applies. As such,</p>

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	<p>data users are likely to make more use of delayed notification rather than notification on or before data collection. There could be attempts to deliberately delay notification and this possible abuse has not been addressed in the Amendment Bill.</p> <p><i>Practical Difficulty in Exercising Opt Out Right</i></p> <p>There are also conceivable difficulties in coming up with a fair and effective system of delayed notification by the data users. Even though the new section 35H(3) (under clause 21) of the Amendment Bill requires data users to provide data subjects with written information, there is no provision governing how such written information is to be brought to the attention of the data subjects, such as the means of giving written notification and whether written notification has to be sent to the data subjects at their respective last known addresses. Since data users are not required to give notifications on or before collecting the data, they may not have data subjects' update contact particulars when serving the written notifications after data collection. The means of notification may fail for one reason or another. Failure of the data subjects to exercise their opt-out options may be due to non-receipt of the data users' notifications and the application of the deeming rule in the circumstances would be unfair to the data subjects.</p>
Section 35K	<p><u>Office of the Privacy Commissioner for Personal Data [LC Paper No. CB(2)263/11-12(01)]</u></p> <p>If a data subject exercises his opt out right subsequent to the prescribed 30-days response period (the new section 35K of the Amendment Bill), the difficulties he faces could well be insurmountable. At this late stage, he may be dealing with the transferee(s) of his personal data rather than the data user making the data transfer. He may not even be able to identify the original data source and tackle the problem at its root. Data subject will have to make opt-out request to each and every data transferee that approaches him.</p>

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Section 35L	<p data-bbox="463 213 1839 256"><u>Office of the Privacy Commissioner for Personal Data [LC Paper No. CB(2)263/11-12(01)]</u></p> <p data-bbox="463 300 2020 555">The new section 35L(2) (under clause 21) of the Amendment Bill imposes a new restriction on the data subjects <i>to exercise opt-out only in writing</i> for the use of their personal data in direct marketing activities when they are approached by data users for the first time. This requirement creates an undue hurdle for data subjects especially if the data users approach them by phone. Currently, there is no restriction imposed under section 34 of the Ordinance to require data subjects to opt out <i>in writing</i>.</p>
Clause 21 –New Section 35N	<p data-bbox="463 603 1507 646"><u>The Law Society of Hong Kong [LC Paper No. CB(2)416/11-12(01)]</u></p> <p data-bbox="463 689 2020 858">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):-</p> <p data-bbox="463 901 2020 991">"(4) A response facility <u>under subsection 3(b)</u> may provide means that allow a data subject to indicate in writing whether the data subject objects to the intended provision, with reference to –</p> <ul style="list-style-type: none"> <li data-bbox="562 1034 1279 1077">(a) any specified kind of data <u>to be provided</u>; <li data-bbox="562 1120 1675 1163">(b) any specified class of persons <u>to which the data is to be provided</u>; or <li data-bbox="562 1206 1899 1249">(c) any specified class of marketing subjects <u>in relation to which the data is to be used</u>. <p data-bbox="483 1292 2020 1382">(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."</p>

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<p>Clause 21 New Section 35R(2)(b)</p>	<p><u>The Law Society of Hong Kong [LC Paper No. CB(2)416/11-12(01)]</u></p> <p>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.</p>
<p>Section 35R</p>	<p><u>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <p>We propose to revise new Section 35R(4)(b) as marked below:</p> <p style="padding-left: 40px;">"(b) the disclosure was <u>permitted</u>, required or authorized by or under any enactment, by any rule of law or by <u>any legal or regulatory requirement or any direction or an order of a regulatory authority or court to which the person is subject</u>;"</p>
<p>Clause 27 Section 50</p>	<p><u>Office of the Privacy Commissioner for Personal Data [LC Paper No. CB(2)263/11-12(01)]</u></p> <p>The power of the Privacy Commissioner to serve enforcement notices on data users to remedy the contraventions will be revised by virtue of section 50 (under Clause 27) of the Amendment Bill. The condition that the contraventions in the circumstances will likely to continue or be repeated is no longer required before the Privacy Commissioner may serve enforcement notices. Also, the Privacy Commissioner will be empowered to specify the steps that data users must take (including ceasing any act or practice) to remedy the contraventions (new section 50 (1A)(c)). It is however not entirely clear whether the scope of such steps will be confined to remedy the contravention attributed to the data user's <i>act or omission</i> under section 50(1A)(b)(ii). Very often, the cause of contravention may be due to the inadequacy (rather than the absence) of the data user's policy practice, or procedure. Under the existing provision of section 50(iii), the Privacy Commissioner is vested with the wide power to direct data users to take steps to address such inadequacy for the purpose of remedying the contraventions or <i>matters occasioning the contraventions</i>. It is important that the Privacy Commissioner's power will not be</p>

Clause/ section	Deputations' views
	eroded as a result of the legislative amendment.
Clause 28 –New Section 50A	<p data-bbox="465 322 1505 357"><u>The Law Society of Hong Kong [LC Paper No. CB(2)416/11-12(01)]</u></p> <p data-bbox="465 405 2018 485">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).</p> <p data-bbox="465 533 2009 568">Regarding the new Section 50A(3), we cannot locate "section 50(1A)(b) and believe this to be an error.</p> <p data-bbox="465 616 1756 657">Accordingly, we suggest that the new Section 50A(1) and (3) be amended as follows:-</p> <p data-bbox="528 705 1301 740">"50A. Offences relating to enforcement notices</p> <p data-bbox="528 750 2018 826">(1) A data user who contravenes an enforcement notice <u>under Section 50(1)</u> commits an offence.....</p> <p data-bbox="528 877 792 912">(2)</p> <p data-bbox="528 963 2018 1129">(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)<u>50(1)</u>, commits an offence.....</p>
Section 50B	<p data-bbox="465 1184 1603 1219"><u>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <p data-bbox="465 1267 1323 1302">We propose to revise new Section 50B as marked below:</p> <p data-bbox="465 1350 1182 1391">"(1) A person commits an offence if the person-</p> <p data-bbox="528 1439 2018 1519">(a) without lawful <u>authority or reasonable</u> excuse, obstructs, hinders or resists the Commissioner</p>

Clause/ section	Deputations' views
	<p>(b) without lawful <u>authority or reasonable</u> excuse, fails to comply with any lawful requirement of the Commissioner; or</p> <p>(c) in the course of the performance or exercise by the Commissioner.....</p> <p>(i) makes to the Commissioner a statement which the person knows to be false or does not believe to be true; or</p> <p>(ii) otherwise knowingly misleads the Commissioner or that other person in a material particular."</p>
<p>Clause 30 Section 58(6)</p>	<p><u>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <p>We are concerned that the new definition of "crime" in Section 58(6) significantly limits the scope of the exemption under Section 58. The current wording of paragraph (b) of the definition renders it applicable to law enforcement agencies only (and not data users in general). That would significantly reduce the ability of a data user such as an international financial institution in implementing global anti-money laundering and anti-terrorist financing measures. Such approach is inconsistent with the recommendation of the Financial Action Task Force (the "FATF") (please see paragraphs 14 to 16 of its Consultation Paper on "The review of the Standards – Preparation for the 4th Round of Mutual Evaluation" published in June 2011, copy attached for ease of reference).</p> <p>Having regard to the FATF recommendation, we are of the view the new definition is not necessary. If it is decided to introduce that definition, we propose to revise it as marked below:</p> <p>"<i>crime</i> means <u>an offence under the laws of Hong Kong or any other jurisdiction;</u>".</p> <p>(a) an offence under the laws of Hong Kong; or</p> <p>(b) if personal data is held or used in connection with legal or law enforcement cooperation</p>

Clause/ section	Deputations' views
	<p>between Hong Kong and a place outside Hong Kong, an offence under the laws of that place;"</p>
<p>Clause 33 Section 60A</p>	<p><u>Office of the Privacy Commissioner for Personal Data [LC Paper No. CB(2)263/11-12(01)]</u></p> <p>The new section 60A(2) (under clause 33) of the Amendment Bill will create practical difficulty and enforcement anomaly. The purpose of section 60A(1) is to create a new exemption for data users from complying with data access request on the ground of self-incrimination in line with the common law right. The proposed section 60A(2) will render information provided in compliance with DPP6 or section 18(1)(b) inadmissible as evidence against the data user for any offence under the Ordinance. However, non-compliance of data access request by data users can be due to many reasons other than on the ground of self-incrimination. For instance, many of such non-compliance cases involve contravention of section 19(1) of the Ordinance where the data user provided a copy of a document pursuant to DPP6 or section 18(1)(b) in purported compliance of a data access request but deliberately conceal or edit some personal data contained in the document which should be provided to the data requestor. If information so provided is rendered inadmissible against data users, it will be extremely difficult (if not impossible) to bring successful prosecution. In such circumstances, the new section 60A(2) will stifle the enforcement and prosecution work on suspected contravention of section 19(1) of the Ordinance.</p>
<p>Clause 34 New Section 63B</p>	<p><u>The Law Society of Hong Kong [LC Paper No. CB(2)416/11-12(01)]</u></p> <p>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.</p> <p>To cater for such commercial realities, we suggest making the following amendments to the new Section 63B(1) and (2):-</p>

Clause/ section	Deputations' views
	<p data-bbox="562 261 1010 300">"63B. Due diligence exercise</p> <p data-bbox="602 352 2022 469">(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 –</p> <ul data-bbox="692 523 2000 775" style="list-style-type: none"><li data-bbox="692 523 2000 600">(a) a transfer <u>of all or any part of</u> the business or property of, or any shares in, the data user;<li data-bbox="692 651 1816 689">(b) a change in the shareholdings of the data user <u>or a related company</u>; or<li data-bbox="692 740 1917 778">(c) an amalgamation of the data user <u>or a related company</u> with another body, <p data-bbox="692 823 2022 900">is exempt from the provisions of data protection principle 3 if each of the conditions specified in subsection (2) is satisfied.</p> <p data-bbox="602 954 1005 992">(2) The conditions are –</p> <ul data-bbox="692 1043 2022 1375" style="list-style-type: none"><li data-bbox="692 1043 2022 1120">(a) the personal data transferred or disclosed is not more than necessary for the purpose of the due diligence exercise;<li data-bbox="692 1171 2022 1375">(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 <u>or another company in the same group of companies</u> or a new body formed as a result of the transaction."

Clause/ section	Deputations' views
	<p><u>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <p>We propose to revise the new Section 63B(4) for clarity and practicability as marked below:</p> <p>"(4) If a data user transfers or discloses personal data to a person for the purpose of a due diligence exercise to be conducted in connection with a proposed business transaction described in subsection (1), the person –</p> <ul style="list-style-type: none"> (a) must only use the data for that purpose; and (b) must, as soon as practicable after the completion of the due diligence exercise <u>and provided that the data is no longer necessary for the purpose of the business transaction</u> – <ul style="list-style-type: none"> (i) return the personal data to the data user <u>without keeping any record of the data; or and</u> (ii) destroy any record of the personal data that is kept by the person."
<p>Clause 39</p>	<p><u>Office of the Privacy Commissioner for Personal Data [LC Paper No. CB(2)263/11-12(01)]</u></p> <p>To impose indirect obligation on data users to use contractual or other means to require data processors to comply with the requirements under DPP2(2) (on retention), DPP3 (on use) and DPP4 (on security) in Schedule 1 of the Ordinance, corresponding amendments have been introduced in clause 39(19) and (26) of the Amendment Bill.</p> <p>It is to be noted that each DPP in Schedule 1 of the Ordinance governs different aspects of the data cycle. In particular, DPP3 governs exclusively the use (including disclosure or transfer) of personal data while DPP4 governs security of personal data. The classification and contents of the DPPs mirror the equivalent requirements of international standards such as the <i>OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data</i> which are widely adopted in many overseas data</p>

Clause/ section	Deputations' views
	<p>protection laws (such as the European Union, Australia and New Zealand). It is however noted in clause 39(26) of the Amendment Bill that the amendment to regulate data processors indirectly on the use of personal data is introduced under DPP4. To achieve consistency with international standards, it is considered more appropriate to introduce this provision with regard to the use of personal data under DPP3.</p>
Section 64	<p><u>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <p>We propose to revise Section 64(2) for clarity as marked below:</p> <p>"(2) Subsection (1) does not apply in relation to –</p> <ul style="list-style-type: none"> (a) a contravention that does not constitute an offence including a contravention of a data protection principle <u>or a contravention of any requirement under section 35B(1), 35H(1) or 35N(1); or</u> (b) a contravention that constitutes an offence underor (c) a contravention of any requirement under section 35B(1), 35H(1) or 35N(1)." <p><u>Hong Kong Retail Management Association [LC Paper No. CB(2)416/11-12(02)]</u></p> <p>Time limit for laying of information – a new section 64A is added to extend section 26 of the Magistrates Ordinance from 6 months to 2 years from the date of the commission of the offence. As this is an exception to the normal rules, the Commissioner needs to explain why this is justified. We are disappointed that there is no mention of this amendment in the explanatory memorandum, nor is any justification provided.</p>

Clause/ section	Deputations' views
<p>Section 66A, 66B & 73F</p>	<p><u>Hong Kong Retail Management Association [LC Paper No. CB(2)416/11-12(02)]</u></p> <p>The Commissioner can grant legal assistance to a data subject – the new sections 66A & 66B are added. At the same time, it is proposed to amend section 73F of the District Court Ordinance to preempt a cost order against the Commissioner unless “the proceedings are brought maliciously or frivolously” and to dispose of the rules of evidence. As these are exceptions to the normal rules, the Government needs to explain why this is justified. We are disappointed that there is no mention of these amendments in the explanatory memorandum, nor is any justification provided.</p>
<p>DPP2(3) & DPP4(2) in Schedule 1</p>	<p><u>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <p>We propose to revise the new DPP2(3) for clarity and practicability as marked below:</p> <p>"[DPP2(3)]Without limiting subsection (2), if a data user engages a data processor, whether within or outside Hong Kong, to process personal data on the data user's behalf, the data user must adopt <u>such contractual or other means as are practicable</u> to prevent any personal data <u>transferred to the data processor from</u> being kept longer than is necessary for processing of the data."</p>
<p>DPP3 (2) and DPP3 (3) in Schedule 1</p>	<p><u>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <p>As regards the data subjects in question, the relevant person in relation to the data subject in a particular case will be best placed to decide whether to give prescribed consent on behalf of the data subject having regard to the relevant circumstances including whether the use of data for a new purpose is clearly in the interest of the data subject. It remains our view that it is reasonable and appropriate to allow a data user to follow the judgment of the relevant person given that the data user is unlikely to be in a position in practice to form a view on this point.</p> <p>In view of the above, the new DPP3(3) is unduly onerous on a data user. We propose the changes as marked below to make it more practicable for a data user to comply:</p>

Clause/ section	Deputations' views
	<p data-bbox="463 220 2020 387">"(3) A data user <u>may</u> must not use the personal data of a data subject for a new purpose even if the prescribed consent for so using that data has been given under subsection (2) by a relevant person, unless the data user has reasonable grounds for believing that the use of that data for the new purpose is clearly <u>not</u> in the interest of the data subject."</p> <p data-bbox="463 435 1839 472"><u>Office of the Privacy Commissioner for Personal Data [LC Paper No. CB(2)263/11-12(01)]</u></p> <p data-bbox="463 520 2020 1161">An opt-out approach is proposed for seeking data subjects' consent to sell their personal data. A data user may deem the data subject to have agreed sale of his/her personal data if no opt-out request is received within the prescribed 30-days response period after the data user has issued the written notification which provides an option (through a response facility) for the data subject to object to the sale of his personal data. In a way, such deeming effect will legalize the sale of personal data by data users that they are not otherwise permitted to engage in under the current law. The reason is that in most if not all cases where the data subject is not informed before or at the time of data collection that the data would be sold, sale of data as the purpose of use would fall outside the reasonable expectation of the data subject and therefore not consistent with or directly related to the original purpose of use of the data. In the circumstances, DPP 3 in Schedule 1 of the Ordinance requires the data user to obtain the prescribed consent of the data subject before the data could be sold. Hence, under the current regime, unless the data user receives a positive indication from the data subject, the data user cannot sell the personal data of the data subject. In sum, the current proposal falls short of the strong public expectation revealed in the Octopus incident and represents a retrograde step in tightening up control over the unauthorized sale of personal data by data users.</p>
DPP4 in Schedule 1	<p data-bbox="463 1214 1608 1251"><u>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <p data-bbox="463 1299 2020 1422">As regards loss of data or any device holding the data, it remains our view that the critical question is whether the "loss" results in unauthorized access or use of data causing damage to the data subjects. Accordingly, we propose to revise DPP4(1) and new DPP4(2) as marked below:</p> <p data-bbox="539 1469 2020 1506">"(1) All practicable steps shall be taken to ensure that personal dataheld by a data user is</p>

Clause/ section	Deputations' views
	<p>protected against unauthorized or accidental access, processing, ensure, loss or use, <u>or loss actually resulting in unauthorized or accidental access, processing, erasure or use of data having particular regard to</u>"</p> <p>(2) Without limiting subsection (1), if a data user engages a data processor, whether within or outside Hong Kong, to process personal data on the data user's behalf, the data user must adopt <u>such contractual or other means as are practicable</u> to prevent unauthorized or accidental access, processing, erasure, loss or use of the data transferred to the data processor for processing, <u>or loss of the data actually resulting in unauthorized or accidental access, processing, erasure or use of the data.</u>"</p>
<p>General issues</p> <p>(i)</p> <p>(ii)</p>	<p><u>Hong Kong Retail Management Association [LC Paper No. CB(2)416/11-12(02)]</u></p> <p><u>Sanctions</u></p> <p>(a) The new sanctions that are imposed are severe – up to \$1,000,000 in fines and 5 years imprisonment. The highest level of fine at the Magistrates Courts is level 6 with a fine of \$100,000. The maximum term of imprisonment under District Court is 7 years. Criminal penalties should be proportionate to the offence, including the seriousness of the damage suffered by the data subject. We understand the reasons for increasing the level of fines, but we do not agree with the proposal to impose custodial penalties. It is very disappointing that the Government has not provided any justification in the explanatory memorandum explaining the reasons for the proposed level of fines and imprisonment.</p> <p>(b) There is a heavier penalty for repeated contravention of enforcement notices. We suggest that guidelines should be provided on specific steps required to remedy contravention in compliance with the enforcement notices.</p> <p><u>Use of Personal Data in Direct Marketing</u></p> <p>We understand the requirement that Personal Information Collection Statements (PICS) should contain</p>

Clause/ section	Deputations' views
	<p>specific information and be understandable and readable. However a balance needs to be struck between requiring more detailed descriptions of intended marketing activities and classes of persons to whom data may be transferred, and the objective of making the PICS understandable and user-friendly. A requirement for too much detail may be counterproductive and discourage the general public from actually reading the PICS statement! Clear guidelines need to be issued on this point and should be made available for further public consultation to ensure it strikes the right balance.</p> <p>(iii) <u>Data Processors</u></p> <p>Further clarification is needed on what types of “other means” are envisaged to ensure that data processors comply with the PDPO. For example, it would not be realistic to expect that data users should continuously monitor every aspect of data processors’ operations, since this would undermine the efficiency benefits of outsourcing / sub-contracting to data processors in the first place.</p> <p>(iv) <u>Regulatory Impact Assessment (RIA)</u></p> <p>In view of the burden on business in compliance with the proposed amendments, we recommend that a RIA should be conducted to assess the impact on relevant stakeholders, including businesses.</p>