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

Response to Submission by
the Hong Kong Bar Association

The Hong Kong Bar Association ("HKBA") has made a submission on certain clauses of the Personal Data (Privacy) (Amendment) Bill 2011 ("the Bill"). HKBA's support for the amendments to section 2 of the Personal Data (Privacy) Ordinance ("PDPO") and the proposed new sections 11A, 19(1A), 39(2)(ca), 50(1A), 60A, 60B, 63C and 63D is noted. Our response to HKBA's views on the other sections is at Annex.

Constitutional and Mainland Affairs Bureau
January 2012

Annex

Section of the PDPO	HKBA's Views	Responses of Constitutional and Mainland Affairs Bureau
New sections on offences	- It is better for the penalties of various offences under the PDPO to be provided in a centralized section and not to have them scattered around the ordinance.	- The amendments will improve the user-friendliness of the PDPO. Offence provisions dealing with specific prohibited acts will be placed in the sections setting out the acts. This is also consistent with recent drafting practice.
New section 14(11)	- The criminalization of "knowingly or recklessly" submitting false or misleading information under the proposed new section 14(11) has not been previously raised. HKBA does not object to this amendment.	- This is not a new offence. It is a repositioning of the existing section 64(1)(a) and (b).
New section 14A	- As a matter of principle, HKBA has no objection to empowering the Privacy Commissioner to take steps to seek information for verification of data user returns. That said, the circumstances under which a person may refuse to provide information "under this or any other Ordinance" in the proposed new section 14A(3) should be spelt out.	- This was also raised by the Bills Committee. We will provide a written response to the Bills Committee.
New section 15(4A)	- The criminalization of "knowingly or recklessly" submitting false or misleading information for maintaining the Register of Data Users under the proposed new section 15(4A) has not been previously raised.	- This is not a new offence. It is a repositioning of the existing section 64(1)(c).
New section	- The precise provision(s) under which the data user is	- The Bills Committee has raised a number of comments

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20(3)(ea)	entitled "under this or any other Ordinance" not to disclose the personal data which is the subject of the data access request should be specified.	when scrutinizing new section 20(3)(ea). We will provide a written response to those comments, which will also deal with the HKBA's comment on this new section.
New section 20(5)	- HKBA supports this amendment to allow the specified body (i.e. the courts or the Administrative Appeals Board) to call for inspection of the data in question and in the meantime the data user will not be required to disclose the same to anyone to the proceedings before the dispute is settled. However it seems appropriate to spell out the temporary exemption pending resolution of the dispute.	- The temporary exemption is clear as new section 20(5)(b) provides that the specified body "must not require the personal data to be disclosed … unless it has decided that the data user must comply with the request".
New section 22(1A)	- Some consequential adjustment may be required because a provision which is the same or similar to that of the proposed new section 22(1A) can be found in section 2(2).	- The existing section 2(2) is proposed to be repealed under clause 3(4) of the Bill.
New section 22(4)	- The remit of this offence is narrower than that under section 64(2) of the current PDPO. The rationale for the proposed change is unknown and it seems unjustified.	- This is a repositioning of the existing section 64(2) to the proposed new section 22(4). The remit is the same. The phrase "for the purpose of having the personal data corrected as indicated in the request" under the proposed new section 22(4) simply sets out the substance of "for the purpose of having the data user concerned comply with the request" under the existing section 64(2). It is considered that the proposed amendment is more user-friendly.
Penalty for offences under	- The Bill aims at a full scale criminalization of the activities relating to sale and transfer of personal data for	- For the purpose of achieving deterrent effect, the sanction must be commensurate with the gravity of the misdeed.

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Part VIA	direct marketing as opposed to introducing changes by way of a Code of Practice previously proposed by the HKBA.	
	- The proposed fines of $500,000 and $1,000,000 and imprisonment of three years and five years for offences under the proposed Part VIA in the PDPO far exceed the current penalty level under section 34(1)(ii), which is to be repealed, and the views expressed by various quarters in the course of consultation.	- These comparatively high levels of penalty were proposed for further public discussions in 2010 following cases of transfer of massive customer personal data by some enterprises to others for direct marketing purposes without explicitly and specifically informing the customers of the purpose of the transfer and the identity of the transferees and seeking the customer's consent. Most of the views received supported the proposal to raise the penalty for contravention of section 34(1)(ii) of the PDPO from a fine at Level 3 ($10,000) to a fine of $500,000 and imprisonment for three years. In view of community concern about the unauthorised sale of personal data and use of personal data in direct marketing, it is necessary that the penalty should be set at a level which provides sufficient deterrent effect.
	- The reference to penalty for offences under the Unsolicited Electronic Messages Ordinance (Cap. 593) is inapt since there is a distinction between "*contravention simpliciter and contravention knowingly*" thereunder.	- To ensure that the formulation of the offence achieves deterrent effect, we have not proposed in the Bill to include a "knowingly" limb which will impose further burden on the prosecutions. We consider it more appropriate to set a single maximum penalty level and leave to the court to decide a suitable level of penalty based on the evidence, facts and seriousness of each case.
	- The provision for "all reasonable precautions" and "due	- The defence is proposed to avoid catching innocent

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	diligence" defences does not dilute the lack of proportionality between the gravamen of offences and the severe penalties. - To introduce such a high statutory maximum fine may be counter-productive bearing in mind the relatively small fines that are likely to be imposed by the Court in routine cases. It may create a wrong impression giving rise to concern as to effectiveness of enforcement action and prosecution.	parties. For the purpose of achieving deterrent effect, the penalty must be commensurate with the gravity of the misdeed. - Whether to impose a penalty near the statutory maximum is a matter for the Court to decide taking into account the circumstances of each individual case. It is not appropriate to assume that the Court would only impose small fines in routine cases.
New section 35C	- The lack of precision as to "other means" whereby a data subject may object to the sale of his personal data may invite unnecessary dispute.	- We do not intend to impose restrictions in respect of the means that the data subject may use to indicate objection. A data subject could indicate his objection through the response facility or through other written means e.g. a letter.
New section 35D(8)	- It appears that the previous proposal of introducing the defence of "reasonable practicable steps" having been taken by the data user to an offence pertinent to erasure of data under section 26 has not been included in the Bill.	- The relevant proposed amendments to section 26 have been included in clause 17 of the Bill. The purpose of the proposed new section 35D(8) is to make it clear that the proposed new section 35D does not affect the operation of the data erasure requirements under section 26.
New section 35G(c)	- The exemption of the application of sections 35H to 35Q to "other social or health care services" may be too wide and may lead to abuse. Tightening up of the definition, for instance, by reference to registered members of the "Hong Kong Council of Social Services" and welfare institutions supervised by and/or receiving funding from the Social	- Not all social and health care service providers are registered members of the Hong Kong Council of Social Service or receive funding from the Government. Hence, it is not appropriate to draw a line by reference to their membership of certain bodies or source of funding; instead, it is more appropriate to draw a line by reference

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	Welfare Department should be considered.	to the nature of their services. For this reason, we have set out in the proposed new section 35G(c) the conditions that need to be satisfied to qualify for the exemption, i.e. that the social or health care services, if not provided, would be likely to cause serious harm to the physical or mental health of the person to whom the services are intended to be provided or any other individual.
New section 35R	- Regarding section 35R(2)(b), the meaning of "psychological harm to the data subject" as a result of disclosure of personal data obtained without consent may give rise to incessant dispute since psychology is not an exact science and "psychological harm" may come in all shades, which are to a large extent subjective and not capable of satisfactory proof in court. - Regarding section 35R(4)(d), the news activity exemption should be considered very carefully. In any event, it should be dealt with in section 61 of the PDPO.	- There are references to the term "psychological harm" in other ordinances such as section 2 of the Organized and Serious Crimes Ordinance (Cap. 455) and Schedule 1 to the Child Abduction and Custody Ordinance (Cap. 512). It is more likely than not that expert evidence will be relied on to prove that harm has been caused to the psychological aspect of a person. - The proposed new section 35R regulates the disclosure of a data subject's personal data, which was obtained from a data user without the data user's consent, with an intent to obtain gain or cause loss to the data subject or causes the data subject psychological harm. Taking into account the seriousness of the conduct, it is inappropriate to provide an across-the-board exemption for news activities as in section 61. Hence, we propose to provide a defence for news activities under the new section 35R.
New section 46(2)(a)	- The precise circumstances authorizing the disclosure of personal data by the Privacy Commissioner is not sufficiently spelt out.	- The disclosure of matters that come to the Privacy Commissioner's knowledge in performing its functions in relation to an investigation or inspection is sometimes

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		necessary for the proper performance of his functions or the proper exercise of his powers under the PDPO. For instance, disclosure may be necessary for the purpose of informing the public the remedial steps taken by a data user following a major data leakage incident, or for discussing with members of the Personal Data (Privacy) Advisory Committee established under section 11 of the PDPO. Moreover, in handling appeals to the Administrative Appeals Board ("AAB"), information and documents possessed by the Privacy Commissioner that relate to the appeal have to be disclosed to AAB and other parties to the appeal. It is not practicable to spell out all the precise circumstances. Similar exception to the duty of secrecy could be found in the Sex Discrimination Ordinance (Cap.480), section 74(1)(e) of which provides that: *"(1) No information given to the Commission by any person ("the informant") in connection with a formal investigation shall be disclosed by the Commission, any member of the Commission or a committee, any employee of the Commission, any conciliator, or any person who has been such a member, employee or conciliator, except -* *…….* *(e)…. so far as may be necessary for the proper performance of the functions of the Commission, to other persons;".*

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New section 46(7)-(9)	- As to the disclosure to foreign authorities under the proposed section 46(7) to (9) of the PDPO, the circumstances necessitating or justifying the disclosure are unclear. - It has previously been suggested that "crime" under section 58 of PDPO should be extended to include *"a crime or offence under the law of a place outside Hong Kong in respect of which legal assistance under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap.525) has been sought to obtained"*. It seems that an amendment to section 58 as aforesaid and a corresponding adjustment to the definition of *"offence"* in section 46(2) will be sufficient to provide for the need of the Privacy Commissioner to provide personal data to foreign authorities. - The HKBA does not support this amendment.	- Under international and regional enforcement cooperation arrangements, participants may contact each other for assistance or make referrals regarding information privacy investigations and enforcement matters that involve each other's jurisdictions. Such investigations and enforcement may not be related to crime, as in some jurisdictions (like Hong Kong), breach of a data protection principle is not an offence.
New section 47(2A)	- As the word "may" is seeking to give the Privacy Commissioner a discretion not to provide the information relating to the investigation while serving an enforcement notice arising therefrom, it may deprive the complainant a proper chance to respond.	- The proposed new section 47(2A) is introduced to allow the Privacy Commissioner to serve an enforcement notice <u>at the time when</u> informing the data user of the result of his investigation under section 47(2). - The provision of information under section 47(2) will continue to be an obligation of the Privacy Commissioner.
New section 47(3A)	- There is no good reason for removing the Privacy Commissioner's obligation to notify the complainant of	- If a complainant has withdrawn his complaint, it should not be obligatory for the Privacy Commissioner to inform

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	the result of an investigation where the complaint has been withdrawn.	him of the investigation result.
New section 50A	- The 2-tier of penalties for repeated failure to comply with enforcement notice is not necessary since the Court will readily take that into account in passing sentence upon subsequent conviction(s).	- It is the policy intention that repeated convictions should be liable to heavier penalty. This has received general support during the two rounds of public consultation conducted previously. The provision of 2-tier penalties would make this policy intention in the legislation clear. Many other Ordinances also adopt 2-tier penalties for repeated convictions (such as section 39 of the Unsolicited Electronic Messages Ordinance (Cap. 593) and section 22 of the Control of Obscene and Indecent Articles Ordinance (Cap. 390)).
New section 50B(1)(b)	- It is advisable to clarify and, if appropriate, specify in the proposed new section 50B(1)(b) that the subsection deals with "lawful requirement of the Privacy Commissioner" other than that under an enforcement notice, which is governed by section 50A.	- It is clear from the wording of section 50B that it deals with obstruction of, and non-compliance with requirements of, the Commissioner and prescribed officers in performing their functions in relation to investigations and inspections. Both section 50 and the proposed new section 50A, on the other hand, specifically deal with enforcement notices issued on completion of an investigation. There is no ambiguity that the proposed new section 50B deals with matters other than enforcement notice.
New section 59A	- HKBA does not object to the transfer of personal data by law enforcement agencies where such transfer is necessary for the proper exercise of guardianship over minors. However, it is unknown why the exemption under	- This proposed new section targets the problem of drug abuse of minors. In view of concern over the rights of personal data privacy of minors, we propose that the scope of exemption should be limited to the Hong Kong

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	section 59A is restricted to the Hong Kong Police and Customs & Excise Department.	Police and Customs and Excise Department and should not be extended to other law enforcement agencies.
New section 64A	- The time-bar for prosecution of offences under the PDPO should only be extended to one year (but not two years as proposed by the Administration), taking into account that in general, the time bar for summary offences is only six months under section 26 of the Magistrates Ordinance (Cap. 227).	- The extension of the time bar for prosecution to two years is necessary as: (a) the contravention may not come to the knowledge of the data subject until some time after the contravention; (b) experience of the Privacy Commissioner is that the complainee and witnesses concerned may not be cooperative in furnishing information. The Privacy Commissioner may have to spend some time to gather evidence; (c) after PCPD has conducted inquiries on the complaint, the case will then be referred to the Police for criminal investigation if suspected offence is involved; the Police will require time in carrying out criminal investigation; and (d) the Department of Justice will also require time to decide on the initiation of prosecution proceedings.
New section 66A	- The role of the Privacy Commissioner as a conciliator or mediator to assist in the resolution of disputes does not seem to have been spelt out.	- Section 8(2) of the PDPO provides that the Privacy Commissioner may do all such things as are necessary for, or incidental or conducive to, the better performance of his functions; and one of the functions of the Privacy

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		Commissioner is to promote compliance with the provisions of the PDPO. The Privacy Commissioner conciliates in cases where the cases are minor and can be resolved without formal investigations. In this regard, conciliation is not a statutory or obligatory process in handling complaints and this provides flexibility and discretion for the Privacy Commissioner to conciliate in cases where it is appropriate to do so.
New section 66B	- It is extraordinary that the "first charge" would bite only on taxed costs (but not damages) as recovered from an opposing party. - In the related proposed amendment (i.e. s73F to the District Court Ordinance), it is proposed that the starting position be that each party will bear its own costs unless the claim is brought maliciously or frivolously or there are special circumstances. Therefore, the circumstances under which the intended first charge would bite are limited. - Further, in so far as it is contemplated that the first charge would be extended to damages recovered by the claimant from the opposing party, it is doubtful whether the legal assistance will still be attractive to the aggrieved person. Given that the amount of damages recovered from contravention of the PDPO may not be very substantial, a more cost-effective way of resolving disputes, such as by way of mediation, may need to be considered.	- As pointed out by HKBA, if the first charge is extended to damages recovered by the claimant from the opposing party, it is doubtful whether the legal assistance will still be attractive to the aggrieved person, given that the amount of damages recovered from contravention of the PDPO may not be very substantial. - It is proposed, vide the proposed new section 73F of the District Court Ordinance, that each party to any proceedings will bear its own costs. However this will not be case if (a) the proceedings were brought maliciously or frivolously; or (b) there are special circumstances which warrant an award of costs. The first charge on costs or expenses for the benefit of the Privacy Commissioner is particularly relevant in the latter cases.

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Data protection principle 3	- The proposed sub-paragraph (2) should be swapped with the proposed sub-paragraph (3) to improve on the flow of the language.	- The proposed sub-paragraph (1) sets out the general rule that personal data should not be used for a new purpose without the prescribed consent of the data subject. The proposed sub-paragraphs (2) and (3) deal with cases where the data subject is a minor, is incapable of managing his or her affairs or is mentally incapacitated. The proposed amendments set out the policy clearly.
Proposals not to be implemented		
Parents' right to access personal data of minors	- The proposal to permit a data user to refuse a data access request made by a "relevant person" on behalf of a minor in order to protect the interests of minors has not found its way into the Bill.	- Under the PDPO, a "relevant person" may make a data access request on behalf of a data subject. If the data subject is a minor, "relevant person" means a person who has parental responsibility for the minor. However, acceding to a data access request made by a "relevant person" on behalf of a minor may not be in the interests of the minor, for instance, where the parent is suspected to have committed child abuse on his/her child. In the public consultation conducted in 2009, we sought public views on the proposal to allow a data user to refuse a data access request made by a "relevant person" on behalf of a minor if the data user has reasonable grounds to believe that compliance with the request would not be in the best interests of the minor, so as to protect the interests of minors. - Views received during the public consultation in 2009 generally indicated reservations on this proposal, the major ones being:

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		(a) The proposal requires data users to gather justifications and make appropriate assessment, after striking a balance among all different factors, in particular the wish and the best interests of minors, on whether there are reasonable grounds to believe that a compliance with the data access request would not be in the best interests of minors. It would be unfair and inappropriate to place such a heavy responsibility on data users. The decision on whether compliance with a data access request is in the best interests of a minor should rest with his parents or legal guardians; (b) Government should not overact and take away parents' right to access the data of their children unreasonably, as this is crucial to them in fulfilling their parental responsibility; (c) Protection against child harassment or abuse is not privacy-related issue. It is, therefore, inappropriate to set up a separate framework under the PDPO to regulate these conducts; and (d) This proposal, intending to restrict parents' right to access personal data of their underage children, is premised on the assumption that many parents would make use of the data access mechanism to obtain their children's personal data for their own purpose rather than for the children's well-being. The assumption has distorted the image of parents.

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		- We therefore do not intend to implement this proposal.
Sensitive personal data	- Sensitive personal data (particularly biometric data) should be subjected to more stringent regulation.	- During the public consultation conducted in 2009, there were diverse views on the coverage of sensitive personal data as well as the circumstances under which handling sensitive personal data would be allowed, with no mainstream consensus reached. Opposition to classification of biometric data as sensitive personal data was particularly strong. In view of this, we do not intend to introduce a more stringent regulatory regime for sensitive data at this stage but will ask the Privacy Commissioner to: (a) step up promotion and education and, where necessary, issue codes of practice or guidelines to suggest best practices on the handling and use of sensitive personal data, such as biometric data and health record; and (b) continue to discuss with the information technology sector possible measures to enhance the protection of biometric data.
Compliance with data access request	- Exemption to redact information in complying with a data access request where the requestor would have known the source of the information in any case should be incorporated into the PDPO.	- A data subject should have a right to have access to his own personal data but there is no reason why he should be provided with information of other data subjects, even though that information may already be known to him.

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		- The exemption proposed by HKBA would only be applicable if it is reasonable in all the circumstances for the data user to believe that the requestor knows who the source is. This would in turn require the data user to gather justifications and to make appropriate assessments on whether there are reasonable grounds to believe that the requestor would have known the source of the information. There would be considerable difficulties in implementation. We have therefore not pursued this.