

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

**Views of deputations on individual clauses of the Bill
(as at 27 January 2012)**

Clause/ section	Deputations' views
Section 3(2)	<p data-bbox="465 435 1451 475"><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p data-bbox="465 520 2020 643">The HKBA notes that s.3(2) of the Bill seeks to refine the definition of "<i>relevant person</i>" under s.2 of PDPO to deal with the situation in respect of mentally incapacitated persons. The HKBA supports this amendment (see Paras. 36 and 46 of the 2010 Submission).</p>
New Section 11A	<p data-bbox="465 695 1608 735"><u>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <p data-bbox="465 780 2020 1031">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> <p data-bbox="465 1082 1451 1121"><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p data-bbox="465 1166 2020 1337">The HKBA notes that s.5 of the Bill seeks to introduce an immunity (under a new s.11A of PDPO) for protection of person(s) appointed by the Commissioner, acting in good faith in the performance of its function, while preserving the civil liability of the Commissioner (as a corporation sole) for the same act or omission giving rise to the liability. The HKBA supports this amendment.</p>
Clause 6 –New Section 13(4)d	<p data-bbox="465 1390 1507 1430"><u>The Law Society of Hong Kong [LC Paper No. CB(2)416/11-12(01)]</u></p> <p data-bbox="465 1474 2020 1509">The current Section 13(4) already defines "specified body" to mean (a) a magistrate, (b) a court, or (c)</p>

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	<p>the Administrative Appeals Board. Why is there a need to specifically add "the chairman of the Administrative Appeals Board" to the definition?</p>
<p>New Section 14A</p>	<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> <p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>As a matter of principle, the HKBA has no objection to s.8 of the Bill (introducing a new s.14A of the PDPO) empowering the Commissioner to take steps to seek information for verification of data users returns (see Para. 33 of the 2010 Submission).</p> <p>However, the criminalisation of "<i>knowingly or recklessly</i>" submitting false or misleading information in relation thereto under s.7 of the Bill has not been previously raised. On balance the HKBA does not object to this amendment. That said, the circumstances under which a person may refuse to provide information "<i>under this or any other Ordinance</i>" in the draft s.14A(3) of PDPO should be spelt out to avoid any confusion or misunderstanding.</p>
<p>Clause 8 --New Section 14A(6)</p>	<p><u>The Law Society of Hong Kong [LC Paper No. CB(2)416/11-12(01)]</u></p> <p>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>

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	<p>"(6) A person who, in purported compliance with a notice under subsection (1) <u>or (4)</u>, 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><u>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <ol style="list-style-type: none"><li data-bbox="465 523 2024 692">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="465 740 2024 1075">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. Further, the exemption from compliance specified in new Section 14A(3) is too narrow.<li data-bbox="465 1219 2024 1508">3. Accordingly, new Section 14A should be revised as marked below:<ol style="list-style-type: none"><li data-bbox="533 1299 2024 1426">(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) –<ol style="list-style-type: none"><li data-bbox="725 1474 2024 1508">(a) to provide any document, record, information or thing <u>reasonably</u> specified in

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	<p>the notice; and</p> <p>(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> <p>(2) The persons are –</p> <p>(a) the data user; and</p> <p>(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> <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> <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</p>

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	<p>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>New Section 15(4A)</p>	<p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>As to s.9 of the Bill (introducing a new s.15(4A)) relating to criminalisation of "<i>knowingly or recklessly</i>" submitting false or misleading information for maintaining the Register of Data Users, the criminalisation of "<i>knowingly or recklessly</i>" submitting false or misleading information in relation thereto under s.7 of the Bill has not been previously raised. On balance the HKBA does not object to this amendment. That said, the circumstances under which a person may refuse to provide information "<i>under this or any other Ordinance</i>" in the draft s.14A(3) of PDPO should be spelt out to avoid any confusion or misunderstanding.</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 19(1A)</p>	<p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p>

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	<p>The HKBA notes that under s.19(1A) of the draft PDPO, an amendment is introduced for the police to "orally" deal with data access requests relating to criminal convictions. The HKBA supports this amendment.</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 user is subject</u> not to disclose the personal data which is the subject of the request; or"</p> <p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>The HKBA notes that a new subsection s.20(3)(ea) of the PDPO is proposed stating that <i>"the data user is entitled under this or any other Ordinance not to disclose the personal data which is the subject of the request"</i>. The precise provision(s) under the PDPO or other Ordinance giving rise to such entitlement ought to be specified (see Paras. 38 & 39 of the 2010 Submission).</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><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>A new provision under s.20(5) is to be inserted to allow the <i>"specified body"</i> (i.e. the Courts or Administrative Appeal 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 resolved. The HKBA supports this amendment (see Para. 37 of the 2010 Submission). However, it</p>

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	<p>seems appropriate to spell out the temporary exemption pending resolution of the dispute, for instance, in s.20(3)(ea) above.</p>
<p>New Section 22(1A)</p>	<p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>The HKBA notes that the new s.22(IA) of the PDPO is intended to limit the authority of the relevant person making a data access request so as not to inadvertently extend the same to a data correction request. Whilst the HKBA is not objecting to the insertion of this sub-section, it would appear that the same or similar provision can be found in s.2(2) of the PDPO as it now stands. Some consequential adjustment may be needed.</p>
<p>New Section 22(4)</p>	<p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>As to the recasting of the offence of supplying false or misleading information in making a data correction request <u>for the purpose of making correction</u> (under the proposed s.22(4) of PDPO), the HKBA notes that the remit of this offence is narrower than that under s.64(2) of the current PDPO (to be repealed).</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>

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	<p>Section 26(2)(a) 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 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>
<p>New Sections 31(4) & (5)</p>	<p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>The HKBA notes that the new s.31(4) & (5) of the PDPO as to offences concerning data matching are a recasting of the offences currently provided for under s.64(4) & (5).</p>
<p>Section 32(5)</p>	<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</p>

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	<p>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>
Clause 21 – New Section 35A	<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>"<i>sell</i> (售賣), 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> <ul style="list-style-type: none">(a) the gain is contingent on any conditions; or(b) the provider retains possession of the data.

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	<p data-bbox="463 221 1688 256"><u>Hong Kong Retail Management Association [LC Paper No. CB(2)416/11-12(02)]</u></p> <p data-bbox="463 308 2020 517">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 data-bbox="188 568 441 643">Clause 21 –New Section 35B</p>	<p data-bbox="463 568 1688 603"><u>Hong Kong Retail Management Association [LC Paper No. CB(2)416/11-12(02)]</u></p> <p data-bbox="463 654 2020 906">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> <p data-bbox="463 957 1507 992"><u>The Law Society of Hong Kong [LC Paper No. CB(2)416/11-12(01)]</u></p> <p data-bbox="463 1043 2020 1209">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="553 1260 2020 1337">"(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 style="list-style-type: none"> <li data-bbox="658 1388 1312 1423">(a) any specified kind of data <u>to be used</u>; <li data-bbox="658 1474 1704 1509">(b) any specified class of persons <u>to which the data is to be sold</u>; or

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	<p>(c) any specified class of marketing subjects <u>in relation to which the data is to be used, if applicable.</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>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <p>We propose the changes marked below for clarity and practicability:</p> <ol style="list-style-type: none">1. Section 35B(3) "(3) The data user must <u>take all practicable steps to provide the data subject with.....</u>";2. Section 35B(3)(b) "(b) a <u>response</u> facility through which the data subject may objects to the intended sale.";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>";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.";

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<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)</p> <p>"(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)</p> <p>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> <hr/> <p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>Section 35C - the lack of precision as to "<i>other means</i>" whereby a data subject may object to sale of his personal data may invite necessary dispute.</p>
<p>New Section 35D</p>	<p><u>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <p>Section 35D(1)</p> <p>"(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>

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	<p>Section 35D(3)</p> <p>"(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>Section 35D(7)</p> <p>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>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 style="list-style-type: none">(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;(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;(iii) requiring data subjects to opt-in on a case-by-case basis will be overly burdensome on data users and impossible to administer and upkeep in practice; and(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>Further, giving data subjects the right to opt-out any time should afford sufficient and appropriate</p>

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	<p>protection to data subject.</p> <p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>Section 35D(8) In passing, it appears that the previous proposal of introducing the defence of "<i>reasonable practicable steps</i>" having been taken by the data user to an offence pertinent to erasure of data under s.26 has not been included in the Bill.</p>
<p>New Section 35F</p>	<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>
<p>Clause 21 –New Section 35G</p>	<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> <ul style="list-style-type: none"> (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

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	<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) any other individual; <u>or</u></p> <p>(d) <u>any other circumstances specified by the Commissioner from time to time.</u></p>
<p>New 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><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>Section 35G(c) The exemption of the application of s.35H to s.35Q (i.e. Self-use by data user and Provision (other than sale) of personal data) to "<i>other social or health care services</i>" 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 Welfare Department should be considered.</p>

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Clause 21 New Section 35H	<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 2022 475">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 data-bbox="533 523 2022 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 use, with reference to –</p> <ul data-bbox="631 651 2004 778" style="list-style-type: none"><li data-bbox="631 651 1339 689">(a) any specified kind of data <u>to be used</u>; or<li data-bbox="631 737 2004 775">(b) any specified class of marketing subjects <u>in relation to which the data is to be used</u>. <p data-bbox="548 826 2022 906">(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="465 954 1688 992"><u>Hong Kong Retail Management Association [LC Paper No. CB(2)416/11-12(02)]</u></p> <p data-bbox="465 1040 2022 1248">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 data-bbox="465 1300 1836 1339"><u>Office of the Privacy Commissioner for Personal Data [LC Paper No. CB(2)263/11-12(01)]</u></p> <p data-bbox="465 1386 779 1425"><i>Delayed Notification</i></p> <p data-bbox="465 1473 2022 1511">The new section 35H (under clause 21) of the Amendment Bill requires data users to inform data</p>

Clause/ section	Deputations' views
	<p>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, 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>

Clause/ section	Deputations' views
Section 35K	<p data-bbox="465 220 1832 256"><u>Office of the Privacy Commissioner for Personal Data [LC Paper No. CB(2)263/11-12(01)]</u></p> <p data-bbox="465 308 2018 560">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>
Section 35L	<p data-bbox="465 609 1832 646"><u>Office of the Privacy Commissioner for Personal Data [LC Paper No. CB(2)263/11-12(01)]</u></p> <p data-bbox="465 697 2018 949">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/ section	Deputations' views
<p>Clause 21 –New Section 35N</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 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>"(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"> (a) any specified kind of data <u>to be provided</u>; (b) any specified class of persons <u>to which the data is to be provided</u>; or (c) any specified class of marketing subjects <u>in relation to which the data is to be used</u>. <p>(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>
<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>

Clause/ section	Deputations' views
	<p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>The meaning of "<i>psychological harm to the data subject</i>" 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 "<i>psychological harm</i>" may come in all shades, which are to a large extent subjective and not capable of satisfactory proof in court.</p>
Section 35R	<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><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>Section 35R(4)(d) The news activity exemption should be considered very carefully. In any event, it should be dealt with in s.61 of the PDPO.</p>
Section 39(2)(ca)	<p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>The HKBA supports the addition of s.39(2)(ca) of the PDPO to empower the Commissioner to refuse to carry out investigation on the ground that the primary cause of complaint is not related to personal data privacy.</p>

Clause/ section	Deputations' views
<p>New Section 46(7) to (9)</p>	<p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>As to the disclosure to foreign authorities under the proposed s.46(7) to (9) of the PDPO, the circumstances necessitating or justifying the disclosure are unclear.</p> <p>(a) Under normal circumstances, it is up to the relevant overseas judicial authority to make requests or assistance to the Hong Kong Courts in obtaining evidence.</p> <p>(b) It has previously been suggested that "<i>crime</i>" under s.58 of PDPO should be extended to include "<i>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</i>".</p> <p>(c) It seems that an amendment to s.58 as aforesaid and a corresponding adjustment to the definition of "<i>offence</i>" in s.46(2) will be sufficient to provide for the need of the Commissioner to provide personal data to foreign authorities.</p> <p>(d) The HKBA does not support this amendment.</p>
<p>New Section 46(2)(b)</p>	<p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>The HKBA reiterates its concern that the precise circumstances authorizing the disclosure of personal data by the Commissioner is not sufficiently spelt out.</p>
<p>New Section 47(2A)</p>	<p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>In so far as the word "<i>may</i>" in s.47(2A) is seeking to give the 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 HKBA maintains its objection.</p>

Clause/ section	Deputations' views
New Section 47(3A)	<p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>It is noted that s.47(3A) is proposed to exempt the Commissioner from notifying the complainant of the result of an investigation where the complaint has since been withdrawn. However, the HKBA maintains that there is no good reason for <i>"removal of this obligation where a complaint, albeit subsequently withdrawn, has been investigated with findings, comments, recommendations and proposed enforcement actions"</i>.</p>
Clause 27 Section 50	<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 eroded as a result of the legislative amendment.</p>
New Section 50(1A)	<p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>The proposed s.50(1A) dispenses with the need for evidence of likelihood of repetition in order for the Commission to serve an enforcement notice. The HKBA supports this amendment.</p>

Clause/ section	Deputations' views
<p>Clause 28 –New Section 50A</p>	<p><u>The Law Society of Hong Kong [LC Paper No. CB(2)416/11-12(01)]</u></p> <p>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>Regarding the new Section 50A(3), we cannot locate "section 50(1A)(b) and believe this to be an error.</p> <p>Accordingly, we suggest that the new Section 50A(1) and (3) be amended as follows:-</p> <p>"50A. Offences relating to enforcement notices</p> <p>(1) A data user who contravenes an enforcement notice <u>under Section 50(1)</u> commits an offence.....</p> <p>(2)</p> <p>(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>
	<p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>The 2-tier of penalties under the proposed s.50A 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).</p>
<p>New Section 50B</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 50B as marked below:</p>

Clause/ section	Deputations' views
	<p>"(1) A person commits an offence if the person-</p> <ul style="list-style-type: none"> (a) without lawful <u>authority or reasonable</u> excuse, obstructs, hinders or resists the Commissioner (b) without lawful <u>authority or reasonable</u> excuse, fails to comply with any lawful requirement of the Commissioner; or (c) in the course of the performance or exercise by the Commissioner..... <ul style="list-style-type: none"> (i) makes to the Commissioner a statement which the person knows to be false or does not believe to be true; or (ii) otherwise knowingly misleads the Commissioner or that other person in a material particular."
<p>New Section 50B(1)(b)</p>	<p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>It is advisable to clarify and, if appropriate, specify in s.50B(1)(b) that that subsection deals with "<i>lawful requirement of the Commissioner</i>" other than that under an enforcement notice, which is governed by s.50A.</p>
<p>New Section 51A</p>	<p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>The HKBA supports the proposed exemption for judicial officers under the new s.51A.</p>
<p>New 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</p>

Clause/ section	Deputations' views
	<p>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 means <u>an offence under the laws of Hong Kong or any other jurisdiction;</u>"</i>.</p> <p style="padding-left: 40px;">(a) an offence under the laws of Hong Kong; or</p> <p style="padding-left: 40px;">(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;"</p>
<p>New Section 59A</p>	<p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>In general, the 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 s.59A is restricted to the Hong Kong Police and Customs & Excise Department. In this connection, it would appear that the recommendation of the HKBA as to refusal of personal data request in order to protect the interests of minors has not yet found its way into the Bill.</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.</p>

Clause/ section	Deputations' views
	<p>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>Sections 60A to D</p>	<p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>The various exemptions provided in s.60A (self-incrimination), s.60B (Due Diligence Exercise in the sale or transfer of business), s.60C (Emergency situations) and s.60D (Transfer or Records in Government Record Services) were (and still are) supported by HKBA.</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> <p>"63B. Due diligence exercise</p>

Clause/ section	Deputations' views
	<p>(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 style="list-style-type: none">(a) a transfer <u>of all or any part of</u> the business or property of, or any shares in, the data user;(b) a change in the shareholdings of the data user <u>or a related company</u>; or(c) an amalgamation of the data user <u>or a related company</u> with another body, <p>is exempt from the provisions of data protection principle 3 if each of the conditions specified in subsection (2) is satisfied.</p> <p>(2) The conditions are –</p> <ul style="list-style-type: none">(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 <u>or another company in the same group of companies</u> or a new body formed as a result of the transaction."
	<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>

Clause/ section	Deputations' views
	<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</u> and (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 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</p>

Clause/ section	Deputations' views
	DPP3.
Section 64	<p data-bbox="465 320 1608 355"><u>The Hong Kong Association of Banks [LC Paper No. CB(2) 237/11-12(05)]</u></p> <p data-bbox="465 405 1424 440">We propose to revise Section 64(2) for clarity as marked below:</p> <p data-bbox="465 489 1234 525">"(2) Subsection (1) does not apply in relation to –</p> <ul style="list-style-type: none"> <li data-bbox="562 574 2020 699">(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> <li data-bbox="562 748 1487 783">(b) a contravention that constitutes an offence underor <li data-bbox="562 833 1805 868">(c) a contravention of any requirement under section 35B(1), 35H(1) or 35N(1)." <p data-bbox="465 917 1688 952"><u>Hong Kong Retail Management Association [LC Paper No. CB(2)416/11-12(02)]</u></p> <p data-bbox="465 1002 2020 1206">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>
New Section 64A	<p data-bbox="465 1262 1451 1297"><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p data-bbox="465 1347 2020 1501">The HKBA maintains its objection to the proposed s.64A extending the time-bar for prosecution of offences under the PDPO to 2 years. One year should be more than sufficient, taking into account that in general, the time bar for summary offences is only 6 months under s.26 of the Magistrates Ordinance (Cap. 227).</p>

Clause/ section	Deputations' views
New Section 66A	<p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>The proposed s.66A does not seem to have spelt out the role of the Commissioner as a conciliator or mediator to assist in the resolution of disputes.</p>
New Section 66B	<p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>Under s.66B, it is proposed that the Commissioner may grant legal assistance to a person to pursue a claim in the District Court (akin to claims under the Equal Opportunities List). In this connection, it is proposed in s.66B(5) that where an assisted claimant is successful, the recovery of "<i>those expenses</i>" (meaning legal costs as taxed) constitutes a first charge for the benefit of the Commissioner.</p> <p>It is extraordinary that the '<i>first charge</i>' would bite only on taxed costs as recovered from an opposing party. In that case, the first charge seems unnecessary since the assisted claimant would be entitled only to damages but not the recovered costs of the action (as taxed), which had been defrayed by the Commissioner in the first place. This should be more a matter of agreement between the Commissioner and the claimant upon granting of legal assistance.</p>
Section 66A, 66B & 73F	<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>
DPP2(3) & DPP4(2) in Schedule 1	<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>

Clause/ section	Deputations' views
	<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> <p>"(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><u>Office of the Privacy Commissioner for Personal Data [LC Paper No. CB(2)263/11-12(01)]</u></p> <p>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</p>

Clause/ section	Deputations' views
	<p>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>
<p>DPP4 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 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>"(1) All practicable steps shall be taken to ensure that personal dataheld by a data user is 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</u> contractual or other means <u>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>

Clause/ section	Deputations' views
<p>Amendment to District Court Ordinance</p>	<p><u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p>By way of illustration, the first charge under s.18A of the Legal Aid Ordinance (Cap. 91) covers damages recovered by the claimant, which will be available, in given circumstances, to answer the costs incurred by the Director of Legal Aid (on behalf of the aided person) but not recovered from the opponent.</p> <p>In the related proposed amendment (i.e. s.73F to the District Court Ordinance, Cap. 336 ill Part 3 of the Bill), 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.</p>
<p>General issues</p>	<p><u>Hong Kong Retail Management Association [LC Paper No. CB(2)416/11-12(02)]</u></p> <p>(i) <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>(ii) <u>Use of Personal Data in Direct Marketing</u></p>

Clause/ section	Deputations' views
	<p>We understand the requirement that Personal Information Collection Statements (PICS) should contain 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> <p>(v) <u>Hong Kong Bar Association [LC Paper No. CB(2)750/11-12(01)]</u></p> <p><u>Amendments Relating to Provisions on Data Users Returns and Register of Data Users</u></p> <p>The HKBA considers that it is better for the penalties of various offences under PDPO to be provided in a centralized section (akin to the previous s.64 of the PDPO) and not to have them scattered around the ordinance. This observation applies throughout the Bill.</p> <p>(vi) <u>Amendment Relating to Provision in Schedules</u></p>

Clause/ section	Deputations' views
(vii)	<p>The HKBA notes that Data Protection Principle 3 is proposed to be totally revamped. However, it may be better to swap proposed sub-paragraph (2) with proposed sub-paragraph (3) with necessary consequential changes to improve on the flow of the language.</p> <p><u>Other Recommendations of the HKBA - Not implemented in the Bill</u></p> <p>The HKBA observes that its recommendations regarding sensitive personal data, in particular, biometric data and 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 have not been provided for in the Bill. The HKBA maintains its position that the PDPO ought to be amended in accordance with these recommendations and proposes this be done by way of committee stage amendments to the Bill.</p>