



Room 525, 5/F., Prince's Building, Central, Hong Kong  
Telephone: 2521 1160, 2521 1169 Facsimile: 2868 5035  
Email: info@hkab.org.hk Web: www.hkab.org.hk

香港中環太子大廈5樓525室  
電話：2521 1160, 2521 1169 圖文傳真：2868 5035  
電郵：info@hkab.org.hk 網址：www.hkab.org.hk

20 April 2012

By post and email to: [bc\\_58\\_10@legco.gov.hk](mailto:bc_58_10@legco.gov.hk)

Bills Committee on Personal Data (Privacy) (Amendment) Bill 2011  
Legislative Council  
Legislative Council Complex  
1 Legislative Council Road  
Central  
Hong Kong

Dear Sirs

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

We refer to our written submissions on the Personal Data (Privacy) (Amendment) Bill 2011 (“**Amendment Bill**”) made on 21 October 2011 and 2 March 2012 on behalf of our members. Following discussions with the Constitutional and Mainland Affairs Bureau and the Office of the Privacy Commissioner for Personal Data (“**PCPD**”), we would like to write again to elaborate on our members’ concerns put to the Bills Committee regarding the proposed definition of “crime” in section 58(6) of the Personal Data (Privacy) Ordinance (“**PDPO**”) in the Amendment Bill.

1 **Anti-money laundering and counter-terrorist obligations in Hong Kong**

We reiterate that our members understand that the Administration seeks to define “crime” in section 58(6) of the PDPO to clarify the scope of application of the exemption provision. However we have genuine concerns over paragraph (b) of the definition which significantly restricts the application of the exemption with respect to an offence outside Hong Kong, particularly regarding money laundering and terrorist financing. As currently drafted, the exemption will be available only where there is “legal or law enforcement cooperation” between Hong Kong and the other place where personal data is held or used.

The Financial Action Task Force (“**FATF**”) recently published its revised recommendations for combating money laundering and terrorist financing (“**Recommendations**”) (available at <http://www.fatf-gafi.org/dataoecd/49/29/49684543.pdf>) and Recommendation 9 specifically states:

*“Countries should ensure that financial institution secrecy laws do not inhibit implementation of the FATF Recommendations.”*

*Chairman* The Hongkong and Shanghai Banking Corporation Ltd  
*Vice Chairmen* Bank of China (Hong Kong) Ltd  
Standard Chartered Bank (Hong Kong) Ltd  
*Secretary* Ronie Mak

主席 香港上海匯豐銀行有限公司  
副主席 中國銀行（香港）有限公司  
渣打銀行（香港）有限公司  
秘書 麥依敏



Hong Kong as a FATF member is obliged to comply with the Recommendations. In addition, financial institutions in Hong Kong are expected to comply with the Recommendations and we draw your attention specifically to Recommendations 17 and 18 which permit the exchange of information with third-party financial institutions or overseas group members to implement policies and procedures for countering money laundering and terrorist financing. The Recommendations, however, are not legally binding on banks or guidelines issued by regulatory authorities.

The narrow wording of paragraph (b) of the definition will give rise to significant issues in practice for financial institutions, especially those which are members of an international group. It is likely to render those financial institutions unable to comply with global anti-money laundering and anti-terrorist financing obligations and best practice policies, in particular, the obligation to assist overseas banks to detect local crime and to protect further losses from money laundering or terrorist financing offences. Examples given by our members include where:

- (a) a Hong Kong bank *suspects* its customer has been involved in money laundering activities which include transfers of funds to overseas bank accounts. The Hong Kong bank should alert the overseas banks to conduct investigations of the recipient account holders so the respective banks can determine whether the recipient account holders are also involved in local money laundering activities; and
- (b) an overseas bank is *determining* if a money laundering or terrorist financing activity has occurred. For example, an overseas bank will investigate if a customer holds an account in another jurisdiction (e.g. Hong Kong) where that customer conducts a suspicious transaction. The overseas bank will then contact the relevant Hong Kong bank to obtain the necessary information regarding the customer's background, account activity patterns etc. to accurately assess whether the transaction is in fact suspicious for law enforcement reporting purposes.

In both cases, a criminal act which involves legal or law enforcement cooperation has not yet occurred but a complete picture for detecting and reporting a crime can only be determined through the cross-border exchange of information.

## 2 Exemption under the *Privacy Act 1988 (Com)* in Australia

We understand that in Australia the *Privacy Act 1988 (Com)* (“**Privacy Act**”) under National Privacy Principle (“**NP Principle**”) 2.1(h) restricts the exemption to disclosure for the purposes of prevention, detection, investigation, prosecution or punishment of criminal offences etc. by or on behalf of an *Australian* enforcement body.

We respectfully submit, however, that in the situations our members are concerned about i.e. the need to disclose customer information overseas where



there is a *suspicion* of or the need to *determine* money laundering or terrorist financing, financial institutions in Australia may rely on NP Principle 2.1(f), which allows:

*“an organization which has reason to suspect that unlawful activity has been, is being or may be engaged in, and uses or discloses the personal information as a necessary part of its investigation of the matter or in reporting its concerns to relevant persons or authorities.”* (Emphasis added).

“Unlawful activity” is not defined in the Privacy Act and consequently the activities of concern are not restricted to Australia. In addition, we expect financial institutions in Australia would rely on NP Principle 9(a) or (f) to allow the transfer of data to overseas financial institutions. We enclose the relevant NP Principle provisions in Annex 1 for your reference.

Hong Kong financial institutions do not have the benefit of a provision analogous to NP Principle 2.1(f) in the PDPO which would allow transfer of customer information as part of the Hong Kong financial institution’s *investigation* into money laundering and terrorist financing or in *reporting* its concerns to *relevant persons*. It is also worth noting that, provided the specified purposes are satisfied, disclosure under Principle 2.1(f) is not limited to any law enforcement body whether in Australia or overseas.

3 Proposed wording for the definition of “crime” in section 58(6) of the PDPO

The proposed definition of “crime” in section 58(6) of the PDPO will effectively restrict the transfer of customer information only to a situation where the Hong Kong financial institution is cooperating with a law enforcement agency overseas. Not only is this far too restrictive to address the situations quoted as examples above in cross-border exchange of information before a criminal act which involves legal or law enforcement cooperation has occurred, but this is also contrary to the Recommendations of the FATF. We, however, take note of the PCPD’s concerns on the revised definition previously proposed by HKAB.

We refer to Part 1, Schedule 1 of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (“AMLO”) which defines “money laundering” and “terrorist financing”, and a copy of which is enclosed in Annex 2 for your reference.

We propose to revise the definition of “crime” in section 58(6) of the PDPO as follows:

“*crime* means -

(a) an offence under the laws of Hong Kong; or

(b) if personal data is held or used in connection with legal or law enforcement cooperation between Hong Kong and a place outside Hong



Kong, an offence under the laws of that place; or

(c) conduct in Hong Kong or elsewhere that would constitute money laundering or terrorist financing as defined in Schedule 1 of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615).”

We consider the proposed drafting is appropriate as it ensures section 58(1)(a) does not open up disclosure of information to facilitate investigation of any overseas crime; rather it limits the information disclosure exemption only for the prevention or detection of acts of money laundering or terrorist financing.

As a FATF member, Hong Kong is duty bound to protect its financial system from illicit funds and proceeds. In such regard, HKAB members as well as the community at large have a stake in helping to ensure Hong Kong continues to enjoy good standing and sound reputation as a major international financial centre. We strongly believe that this is a policy objective that is in the public interest and should be accommodated appropriately under the exemption provision, hence our proposed wording above.

Given the wider policy issues raised, we are also copying this letter to the Financial Services and the Treasury Bureau (the bureau responsible for the AMLO) and the Hong Kong Monetary Authority (as the regulatory authorities for the banking sector) to keep them informed of this discussion.

If you have any further questions, please contact our Manager Ms Ivy Wong at 2526 8895.

Yours faithfully,

Ronie Mak  
Secretary

Enc.

c.c. FSTB (Attn: Mr Patrick Ho)  
HKMA (Attn: Ms Meena Datwani)  
Dr. the Hon David K.P. Li, GBM, GBS, JP, Member of the Legislative Council

Clause 2

---

**2 Use and disclosure**

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

## Clause 2

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

## Clause 2



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

- Note 1: It is not intended to deter organisations from lawfully co-operating with agencies performing law enforcement functions in the performance of their functions.
- Note 2: Subclause 2.1 does not override any existing legal obligations not to disclose personal information. Nothing in subclause 2.1 requires an organisation to disclose personal information; an organisation is always entitled not to disclose personal information in the absence of a legal obligation to disclose it.
- Note 3: An organisation is also subject to the requirements of National Privacy Principle 9 if it transfers personal information to a person in a foreign country.

- 2.2 If an organisation uses or discloses personal information under paragraph 2.1(h), it must make a written note of the use or disclosure.
- 2.3 Subclause 2.1 operates in relation to personal information that an organisation that is a body corporate has collected from a related body corporate as if the organisation's primary purpose of collection of the information were the primary purpose for which the related body corporate collected the information.
- 2.4 Despite subclause 2.1, an organisation that provides a health service to an individual may disclose health information about the individual to a person who is responsible for the individual if:
- (a) the individual:
    - (i) is physically or legally incapable of giving consent to the disclosure; or

## Clause 8

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

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

## 7.3 In this clause:

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

**8 Anonymity**

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

(X)

**9 Transborder data flows**

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

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



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

## 10 Sensitive information

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

ANNEX 2

Previous Provision	Next Provision	中文	Past Versions	Back to List of Enactments
--------------------	----------------	----	---------------	----------------------------

## Contents of Section

Add to Printing List

Chapter:	615	Title:	Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance	Gazette Number:	15 of 2011
Schedule:	I	Heading:	Interpretation	Version Date:	01/04/2012

[section 2]

## Part 1

## 1. In this Ordinance—

*currency* (貨幣) includes a cheque and a traveller's cheque;

*document* (文件) has the meaning given by section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap 571);

*function* (職能) includes power and duty;

*money* (金錢) means money in whatever form or currency;

*money changing service* (貨幣兌換服務) means a service for the exchanging of currencies that is operated in Hong Kong as a business, but does not include such a service that is operated by a person who manages a hotel if the service—

(a) is operated within the premises of the hotel primarily for the convenience of guests of the hotel; and

(b) consists solely of transactions for the purchase by that person of non-Hong Kong currencies in exchange for Hong Kong currency;

*money laundering* (洗錢) means an act intended to have the effect of making any property—

(a) that is the proceeds obtained from the commission of an indictable offence under the laws of Hong Kong, or of any conduct which if it had occurred in Hong Kong would constitute an indictable offence under the laws of Hong Kong; or

(b) that in whole or in part, directly or indirectly, represents such proceeds,

not to appear to be or so represent such proceeds;

*money service* (金錢服務) means—

(a) a money changing service; or

(b) a remittance service;

*property* (財產) includes—

(a) money, goods, choses in action and land, whether in Hong Kong or elsewhere; and

(b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in paragraph (a);

*record* (紀錄) has the meaning given by section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap 571);

*remittance service* (匯款服務) means a service of one or more of the following that is operated in Hong Kong as a business—

(a) sending, or arranging for the sending of, money to a place outside Hong Kong;

(b) receiving, or arranging for the receipt of, money from a place outside Hong Kong;

(c) arranging for the receipt of money in a place outside Hong Kong;

*Review Tribunal* (覆核審裁處) means the Tribunal as defined by section 54;

*terrorist financing* (恐怖分子資金籌集) means—

(a) the provision or collection, by any means, directly or indirectly, of funds—

(i) with the intention that the funds be used; or

(ii) knowing that the funds will be used,

in whole or in part, to commit one or more terrorist acts (whether or not the funds are actually so used); or

(b) making available funds or financial (or related) services, directly or indirectly, to or for the benefit of a person knowing that, or being reckless as to whether, the person is a terrorist or terrorist associate.

2. In the definition of *terrorist financing*, *funds* (資金), *terrorist* (恐怖分子), *terrorist act* (恐怖主義行為) and *terrorist associate* (與恐怖分子有聯繫者) have the meaning given by section 2(1) of the United Nations (Anti-Terrorism Measures) Ordinance (Cap 575).

3. A person who only provides to financial institutions a message system or other support systems for transmitting funds is not, for the purposes of this Ordinance, to be regarded as a person operating a remittance service.

## Part 2

## 1. In this Ordinance—

*appointed insurance agent* (獲委任保險代理人) has the meaning given by section 2(1) of the Insurance Companies Ordinance (Cap 41);

*authorized institution* (認可機構) has the meaning given by section 2(1) of the Banking Ordinance (Cap 155);

*authorized insurance broker* (獲授權保險經紀) has the meaning given by section 2(1) of the Insurance Companies Ordinance (Cap 41);

*authorized insurer* (獲授權保險人) means an insurer authorized under the Insurance Companies Ordinance (Cap 41);

*Commissioner* (關長) means the Commissioner of Customs and Excise, any Deputy Commissioner of Customs and Excise, any

Assistant Commissioner of Customs and Excise or a person to whom the Commissioner of Customs and Excise has delegated any of his or her functions under section 26;

*financial institution* (金融機構) means—

(a) an authorized institution;

(b) a licensed corporation;

(c) an authorized insurer;

(d) an appointed insurance agent;

(e) an authorized insurance broker;

(f) a licensed money service operator; or

(g) the Postmaster General;

*Insurance Authority* (保險業監督) means the Insurance Authority appointed under section 4 of the Insurance Companies Ordinance (Cap 41);

*licensed corporation* (持牌法團) has the meaning given by section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap 571);

*licensed money service operator* (持牌金錢服務經營者) means the holder of a licence as defined by section 24;

*Monetary Authority* (金融管理專員) means the Monetary Authority appointed under section 5A of the Exchange Fund Ordinance (Cap 66);

*Postmaster General* (郵政署署長) means the Postmaster General of Hong Kong, and includes the deputy postmaster general and every assistant postmaster general;

*relevant authority* (有關當局)—

(a) in relation to an authorized institution, means the Monetary Authority;

(b) in relation to a licensed corporation, means the Securities and Futures Commission;

(c) in relation to an authorized insurer, appointed insurance agent or authorized insurance broker, means the Insurance Authority; and

(d) in relation to a licensed money service operator or to the Postmaster General, means the Commissioner;

*Securities and Futures Commission* (證監會) means the Securities and Futures Commission referred to in section 3(1) of the Securities and Futures Ordinance (Cap 571).

[Previous Provision](#)[Next Provision](#)[中文](#)[Past Versions](#)[Back to List of Enactments](#)