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

Responses to Outstanding Issues raised by the Bills Committee and Submissions by Deputations

This paper provides responses to the outstanding issues raised by the Bills Committee at previous meetings and the views raised in the submissions from the Hong Kong Association of Banks (13, 20 and 23 April 2012), Consumer Council (April 2012), the Privacy Commissioner for Personal Data (18 and 26 April 2012) and The Law Society of Hong Kong (20 April 2012). The responses are at **Annex**.

Constitutional and Mainland Affairs Bureau
April 2012

Annex

Section No.	Deputations' Views	Responses of Constitutional and Mainland Affairs Bureau ("CMAB")
New section 14A	The Law Society of Hong Kong: - The Law Society notes that CMAB on the whole simply asserts that it either disagrees or will not adopt the suggestions made by the Law Society. The Law Society wishes to reiterate its submission dated 24 November 2011. - One of the suggestions is to amend new section 14A(6) to read – "A person who, in purported compliance with a notice under subsection (1) or (4), knowingly or recklessly provides any document, record, information or thing, or any response to any question, which is false or misleading in a material particular, commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months."	- A number of suggestions in the Law Society's submission of 24 November 2011 were on the provisions in the Personal Data (Privacy) (Amendment) Bill 2011 ("the Bill") relating to the use or provision of personal data for direct marketing purposes, which have been overtaken by the revised proposals put forward by CMAB. - On the Law Society's suggested amendment to new section 14A(6), we have earlier agreed to amend the provision to make clear that any person who, in response to a notice issued by the Privacy Commissioner for Personal Data ("PCPD"), knowingly or recklessly provides any information in a data user return or a subsequently revised data user return, which is false or misleading in a material particular, is liable on conviction to a fine at level 3 and to imprisonment for 6 months. - Our responses to the Law Society's other suggestions have been provided vide LC Paper No. CB(2)569/11-12(02).
New section 35A(1)[1]	Hong Kong Association of Banks ("HKAB"): - HKAB suggests that the definition of "consent"	- In the hypothetical situation cited by HKAB where the bank

[1] Section numbers of provisions under Part VIA refer to those in the revised version in the Annex to LC Paper No. CB(2)1169/11-12(01).

Section No.	Deputations' Views	Responses of Constitutional and Mainland Affairs Bureau ("CMAB")
	be amended as follows – "***consent***, in relation to a use of personal data in direct marketing or a provision of personal data for use in direct marketing, includes ~~an indication of~~ no objection to the use or provision."	provides an option on the application form for a particular service and the data subject is informed that his personal data may be used for direct marketing purposes unless he indicates his disagreement and given a box to tick if he disagrees, subject to the manner in which the information in the form is presented, the data subject returning that form with the box not ticked may be able to serve the purpose of "indication of no objection" under our proposed arrangement.
New section 35A(2)	Consumer Council: - Consumer Council does not agree with the proposal to confine the proposed regulatory regime to "sale" (subsequently replaced by "provision for gain") of personal data for direct marketing purposes.	- As explained in LC Paper No. CB(2)1169/11-12(01), the proposed regulatory regime for sale of personal data is to address community concerns over recent cases of sale of massive customer personal data by some enterprises to others for direct marketing purposes without explicitly and specifically informing the customers of the sale and seeking their consent. Having regard to concerns that the definition of "sell" in the Bill (subsequently replaced by "provide for gain") may inadvertently catch activities which are generally accepted by, and fall within the reasonable expectation of, data subjects, we propose to confine the proposed regulatory regime to sale of personal data for direct marketing purposes.

Section No.	Deputations' Views	Responses of Constitutional and Mainland Affairs Bureau ("CMAB")
	HKAB: - HKAB requests that the definition of "sell" should be amended to exclude intragroup transfer of customers' personal data for products/services related to the data user's business.	- Since goods, facilities or services offered by members of a group could vary considerably, it would not be appropriate to exclude "intragroup transfer" of customers' personal data from the proposed regulatory regime.
New section 35D(1) (i.e. "grandfathering")	PCPD: - PCPD suggests incorporating the "easily understandable and readable" requirement as a further condition to satisfy section 35D(1).	- We have no objection to this and will amend the provision accordingly.
	PCPD: - PCPD suggests specifying a cut-off date for the grandfathering arrangement under new section 35D(1), which should be a date as soon as possible after passing of the Bill, before the commencement of the new provisions relating to direct marketing. HKAB: - HKAB stresses the importance of imposing the	- We note HKAB's support for the current proposed arrangement for the cut-off date. - The grandfathering arrangement is to cater for personal data collected before the commencement of the new requirements relating to direct marketing, including that collected during the period between the passing of the Bill and the commencement of the new requirements, when the guidance note(s) to be issued by the PCPD and other publicity and public education work to assist data users in complying with the new requirements are not

Section No.	Deputations' Views	Responses of Constitutional and Mainland Affairs Bureau ("CMAB")
	effective date of the provisions relating to direct marketing (i.e. "the commencement date") as the cut-off date for the grandfathering arrangement as proposed by the Administration. This is to avoid any interim gap period when no further grandfathering of personal data is possible while the new regime has yet to come into place. Any such gap period is likely to create confusion to customers as different data users may adopt different practices in addressing the issue.	yet in place. Setting an earlier cut-off date for the grandfathering arrangement will mean advancing the commencement date of the new requirements for those data users who intend to use the personal data collected during the interim period in direct marketing. However, during this interim period, PCPD's guidance note(s) and other publicity and public education work to assist data users in complying with the new requirements are not yet in place. This will create unnecessary confusion to both data users and data subjects. Also, data users who already fulfill the conditions for grandfathering under the new section 35D(1) might have to take steps to comply with the new requirements if they intend to continue to use the data in direct marketing after the commencement date. This is not in line with the purpose of the grandfathering arrangement. Setting the commencement date as the cut-off date will provide consistency. - The objective of PCPD's suggestion to set an earlier cut-off date is to prevent massive direct marketing activities by data users before the commencement date. With the latest drafting of section 35D(1), a data user cannot trigger the exemption simply by having used the personal data of a data subject in direct marketing before the commencement date. The data user's eligibility for the exemption is also subject to the conditions that the data user has not, in relation to the use of the personal data in direct marketing before the commencement date, contravened

Section No.	Deputations' Views	Responses of Constitutional and Mainland Affairs Bureau ("CMAB")
		any existing requirements under the Personal Data (Privacy) Ordinance, and that the data subject has not indicated objection. Moreover, the data subject must have been explicitly informed of the use of his personal data in direct marketing in relation to the class of marketing subjects before the commencement date.
	HKAB: - HKAB suggests addition of the following words to section 35D(1) to expressly provide that the grandfathering arrangement (i) covers personal data changed or additional personal data collected subsequent to first time collection; and (ii) will apply with respect to a data subject's data if the data user has used any data of that data subject before the cut-off date to be specified – "Section 35C does not apply in relation to the continued use by a data user of a data subject's personal data held by the data user from time to time in direct marketing in relation to a class of marketing subjects if, before the commencement date – …. (b) the data user had so used any of the data;…"	- HKAB's suggested addition of the words "held by the data user from time to time" will mean that personal data of the data subject newly collected after the commencement date will be grandfathered as well. This will widen the scope of the proposed exemption and deviates from our original policy intent to confine the grandfathering to the continued use of the data subject's personal data collected before the commencement date (i.e. "pre-existing data"). - In response to the second point raised by HKAB and the comments from PCPD, we will amend the provision to make clear that any personal data of the data subject already collected before the commencement date and future updates of such data (but not data newly collected after the commencement date) would be covered under the grandfathering arrangement.

Section No.	Deputations' Views	Responses of Constitutional and Mainland Affairs Bureau ("CMAB")
	PCPD: - PCPD suggests clarifying that the drafting covers those personal data of the data subject that a data user had not used before the commencement date; and caters for updating of personal data after the commencement date.	
New section 35E(1)	PCPD: - PCPD suggests that the following additional requirements be incorporated – (a) that the written confirmation has to be sent no later than 14 days after the oral consent is given; (b) that the written confirmation has to be sent to the last known correspondence address of the data subject; and	- We have no objection to (a) and will incorporate it in the relevant provision accordingly. - We would not wish to confine the sending of the written confirmation to the address of the data subject. The data subject may wish to receive the written confirmation by fax, e-mail or other methods. The data user may also hand over the written confirmation to the data subject in person if the opportunity arises.

Section No.	Deputations' Views	Responses of Constitutional and Mainland Affairs Bureau ("CMAB")
	(c) that the data user has not received any objection from the data subject to the oral consent within 14 days after the written confirmation is sent to the data subject.	- Data users should be allowed to use the personal data of data subjects in direct marketing once they have received the oral consent of the data subjects and sent the written confirmation.
	Bills Committee: - At the meeting on 17 April 2012, the Administration was asked to consider improving the drafting of section 35E(1)(b)(ii) to stipulate the kinds of personal data to be used and the classes of marketing subjects in relation to which the data would be used by making reference to section 35C(2)(b). - At the meeting on 17 April 2012, the Administration was asked to consider encouraging the direct marketing trade to adopt good practices including presenting the contents of written confirmation in an easily readable manner.	- We have no objection to this and will amend the provision accordingly. - We will convey this suggestion to the PCPD for consideration in preparing the guidance note(s) and public education materials.

Section No.	Deputations' Views	Responses of Constitutional and Mainland Affairs Bureau ("CMAB")
New section 35K	HKAB: - HKAB points out that for the banking industry, a written response is not feasible for certain financial services delivery channels including telebanking and suggests that it will be more practicable and convenient to customers to indicate no objection to the use and sale of personal data in direct marketing during the telephone conversation with the bank, rather than in writing. PCPD: - PCPD suggests that the previous proposal, i.e. the data user must not provide (whether for gain or not) the data subject's personal data to third parties unless the latter's written consent has been received, should be maintained, as an oral consent falls short of the standard of an express and informed consent. Bills Committee: - At the meeting on 17 April 2012, a Member objected to the proposal to allow oral consent for	- We have further considered this. In view of the PCPD's and Member's strong concerns, we propose to amend new section 35K such that provision of personal data (whether for gain or not) will be subject to the in writing requirement, i.e. if a data user intends to provide (whether for gain or not) a data subject's personal data to another person for use in direct marketing, the data user must provide to the data subject in writing the required information. Also, before proceeding to provide (whether for gain or not) the data, the data user must receive a reply in writing from the data subject indicating that the data subject does not object to the data user doing so.

Section No.	Deputations' Views	Responses of Constitutional and Mainland Affairs Bureau ("CMAB")
	provision of personal data to a third party for gain.	
Part VIA – Recording requirement for oral communication between data user and data subject	Bills Committee: - At the meeting on 17 April, the Administration was asked to consider stipulating in this section that, if the information in section 35C(2)(a) and the consent in section 35E(1)(a) is given orally, audio recording will be required and data users have to alert data subjects that the telephone communication between them will be recorded. - The Administration was asked to consider encouraging the direct marketing trade to record the complete telephone communication. The PCPD was requested to provide data users with standard scripts for this purpose.	- It would be in the interest of the data user to keep a record of the consent of the data subject, whether in written form or audio recording. We have made reference to the arrangements in the banking and securities trades. The audio recording arrangement is set out in the guidelines or code issued by the regulatory authorities. The PCPD will issue guidance note(s) on the new requirements and audio recording for verbal communication will be covered. It is also relevant to point out that even though the data subject may not have recorded his/her oral consent, it is open to him/her to make a data access request to obtain a copy of the relevant recording. - We will convey these suggestions to the PCPD for consideration in preparing the guidance note(s) and public education materials.

Section No.	Deputations' Views	Responses of Constitutional and Mainland Affairs Bureau ("CMAB")
Part VIA – Source of personal data	PCPD: - PCPD asks the Administration to reconsider its proposal to confer on individuals a right to be informed of the source of their personal data by direct marketers.	- According to two surveys conducted by the then Office of the Telecommunications Authority in 2008 and 2009, around half of the person-to-person telemarketing calls ("P2P calls") did not involve the recipients' personal data. Of the other half, in many cases there is already an existing customer relationship between the two parties. For the remaining cases, if data users were mandated to inform recipients of P2P calls of the source of their personal data when required by the recipients, this requirement might be circumvented by presenting the calls as random calls without disclosing any of the recipient's personal data. Overall, the proposal will not be effective in addressing the nuisance caused by P2P calls. Instead, it will increase the operational burden and costs of law-abiding data users, in particular small and medium enterprises, in complying with the requirement. - Those who find P2P calls a nuisance may, at any time, require the data users to cease to use their personal data in direct marketing. The penalty for non-compliance will be increased to a fine of $500,000 and imprisonment for 3 years, as proposed in the Bill. Furthermore, to provide better protection to data users, we have proposed that a data user who intends to provide personal data of a data subject to a third person for use in direct marketing must inform the data subject of certain specified information relating to the provision, including the class of

Section No.	Deputations' Views	Responses of Constitutional and Mainland Affairs Bureau ("CMAB")
		persons to whom the data is to be provided. Also, a data subject who has been provided with the specified information may subsequently require the data user to notify the person(s) to whom his/her personal data has been provided for use in direct marketing to cease to so use the personal data. The person who receives such a notification from the data user must cease to use the personal data of the data subject in direct marketing in accordance with the notification. Otherwise, the person commits an offence and is liable on conviction to a fine of $500,000 and to imprisonment for 3 years (or a fine of $1,000,000 and to imprisonment for 5 years if the provision is for gain).
Part VIA - Sufficient lead time for implementation	HKAB: - HKAB suggests a lead time of not less than ten months from the passing of the Bill to the effective date of the relevant new requirements relating to direct marketing.	- We have discussed with PCPD and consider that a lead time of around nine months from enactment of the Bill will be needed to allow sufficient time for PCPD to draw up the new guidance note(s) and undertake other publicity and public education activities on the new provisions as well as for data users to prepare for compliance with the new requirements.
New section 50(1A)(c)	PCPD: - The Bill proposes to delete the words "the matters	- A contravention has to be viewed in its entirety – steps to

Section No.	Deputations' Views	Responses of Constitutional and Mainland Affairs Bureau ("CMAB")
	occasioning it" from the provision. This will take away PCPD's power to address the indirect factors leading to a contravention (such as contravention due to the inadequacy or absence of the data user's policy practice or procedure). Hence the words "the matters occasioning it" should be added to section 50(1A)(c).	remedy the contravention will not be confined to those that only directly deal with the act or omission that constitutes the contravention, but also include those that deal with the practices and circumstances leading to the contravention. Section 50(1A) does not contain any provision that qualifies the steps which may be taken, and any steps that are directed at remedying the contravention will be covered. - Nevertheless, in view of the strong concern of PCPD, we will amend the provision to make clear that steps specified in the enforcement notice may include steps to prevent recurrence of the contravention.
New section 58(6)	HKAB: - The definition of "crime" in the proposed new section 58(6)(b) is likely to render financial institutions unable to comply with Recommendations 17 and 18 of the Financial Action Task Force ("FATF") under which international financial institutions are permitted to exchange information with third-party financial institutions or overseas group members to implement policies and procedures for countering money laundering and terrorist financing.	- Section 58 provides for exemption from Data Protection Principles 3 and 6 and section 18(1)(b) for the purposes of, among other things, the prevention or detection of crime. There would need to be strong justifications for extension of the exemption. - As advised by the Financial Services and the Treasury Bureau, the revised FATF Recommendations require member jurisdictions to ensure that financial institutions will implement internal policies and procedures against money laundering and

Section No.	Deputations' Views	Responses of Constitutional and Mainland Affairs Bureau ("CMAB")
	- To address this, a subsection (c) should be added to section 58(6), which reads "*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)*". PCPD: - HKAB's proposal, if not properly constituted, would permit disclosure of personal data to facilitate investigation of crime committed outside Hong Kong by various data users to overseas requestors without sufficient safeguards, hence open up a back door too wide that is beyond control.	terrorist financing, including sharing information within the financial group for the purpose of customer due diligence and money laundering and terrorist financing risk management. FATF specifically prescribes that adequate safeguards on the confidentiality and use of information exchange should be in place. Revised Recommendations 17 and 18 are not yet due for implementation. The issue of implementation will be dealt with by the Administration separately. - We do not intend to expand the definition of "crime" as proposed by HKAB.
New section 63B	HKAB: - Section 63B(4) should read – "(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	- The exemption is confined to the purpose of a due diligence exercise and therefore it follows that the data should be returned and/or destroyed after completion of the exercise.

Section No.	Deputations' Views	Responses of Constitutional and Mainland Affairs Bureau ("CMAB")
	transaction described in subsection (1), the person – (a) must only use the data for that purpose; and (b) must, as soon as practicable after the completion of the due diligence exercise and provided that the data is no longer necessary for the purpose of the business transaction – (i) return the ~~personal~~ data to the data user without keeping any record of the data; or~~and~~ (ii) destroy any record of the ~~personal~~ data that is kept by the person."	
New section 63D	Bills Committee: - At the meeting on 26 Mach 2012, the Administration was requested to provide written information on the meaning of "records".	- According to the Government Records Service, a "record" is any recorded information or data in any physical format or media created or received by an organization during its course of official business and kept as evidence of policies, decisions, procedures, functions, activities and transactions.

Section No.	Deputations' Views	Responses of Constitutional and Mainland Affairs Bureau ("CMAB")
New section 66B	PCPD: - An express provision which empowers the in-house lawyers of PCPD to provide legal services to the public (such as provision of legal advice, attendance in court and other assistance which is necessary for and incidental to the legal proceedings) should be added to section 66B.	- In the case of solicitors, there does not seem to be any rules in the Law Society of Hong Kong's Guide to Professional Conduct prohibiting solicitors employed by PCPD to provide legal advice or services to members of the public. PCPD may wish to seek confirmation from the Law Society of Hong Kong. - In the case of barristers, paragraph 181 of the Bar Code states that "*an employed or non-practising barrister may not without the permission of the Bar Council act … in any capacity whereby directly or indirectly he supplies legal advice or services to the public …*". In this regard, barristers employed by PCPD should apply to the Hong Kong Bar Council for permission to supply legal advice or services to the public for the purpose of section 66B. - PCPD has agreed to approach the legal professional bodies to seek their views and confirmation. We will work with PCPD if follow up action is required. - The above will not affect the launch and operation of the PCPD's legal assistance scheme. It is relevant to point out that the Equal Opportunities Commission has been running a similar legal assistance scheme and their in-house lawyers have been

Section No.	Deputations' Views	Responses of Constitutional and Mainland Affairs Bureau ("CMAB")
		providing legal services to the public.
	- Whether or not the legal advice given by an "employed solicitor/barrister" (i.e. PCPD's in-house lawyer) to an aided person can enjoy legal professional privilege should be clarified.	- Section 66B is modelled on the precedent provisions in the anti-discrimination ordinances. The Equal Opportunities Commission has been running a similar legal assistance scheme and their in-house lawyers have been providing legal advice to the public.