



HONG KONG BAR ASSOCIATION

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18th May 2012

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

Attn: Ms. Elyssa Wong
Clerk to Bills Committee

Dear *Sirs,*

Committee Stage Amendments to the Personal Data (Privacy) (Amendment) Bill 2011

I refer to your letter of 3rd April 2012.

The Bar Council has prepared its Submissions on the Committee Stage Amendments to the Personal Data (Privacy) (Amendment) Bill 2011 with consideration on (LC Paper No. CB(2) 1864/11-12(01) and LC Paper No. CB(2) 1788/11-12(01). The Submissions was endorsed at the Bar Council Meeting held on 17th May 2012.

A copy of the Submissions of the Hong Kong Bar Association dated 18th May 2012 is enclosed for the consideration of the Bills Committee.

Yours sincerely,

Kumar Ramanathan
Kumar Ramanathan SC
Chairman

香港大律師公會

香港金鐘道三十八號高等法院低層二樓

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Committee Stage Amendments to the
Personal Data (Privacy) (Amendment) Bill 2011

Submission of the Hong Kong Bar Association

1. The Hong Kong Bar Association ("HKBA") provides this Submission on the Committee Stage Amendments to the Personal Data (Privacy) (Amendment) Bill (the "Bill").

Proposed new Part VIA

"Easily understandable" and "Easily readable" (Sections 35D(1) and 35J(4))

2. Section 35D is a provision to deal with personal data already obtained by the data user before commencement of the provisions introduced by way of amendment to the Personal Data (Privacy) Ordinance (the "PDPO").
3. In essence, it provides that the data user can use personal data already obtained before the commencement date for direct marketing if explicit notification has been given to the data subject and no objection has been received from the data subject.
4. Likewise, s.35J seeks to introduce a similar mechanism of notification and consent where a data user intends to provide personal data kept by him to another person for use in direct marketing.
5. Under ss.35D(1) and 35J(4), it is stated that the information provided to the data subject has to be "easily understandable" and "easily readable". The HKBA considers that while "*readability*" is capable of an objective determination, it would be rather difficult to decide objectively if information is "easily understandable". It calls into question the literacy skills of both the author and the reader, and where courts are called upon to decide on this question, there is the undesirable likelihood of a variety of standards.

Cessation of Use of Personal Data (Sections 35G(5), (6) and 35L(7), (8))

6. Both ss.35G and 35L prescribe an offence subject to a defence of taking all reasonable precautions and exercising all due diligence to avoid the commission of the offence and at the same time provide that the operation of the section does not affect the operation of s.26. It is necessary therefore consider the terms of s.26, which is proposed to be amended in subs.(2)(a) to require a data user to "take all practicable steps to" erase personal data in accordance with sub-section (1) notwithstanding that any other data user controls (whether in whole or in part) the processing of the data. The HKBA suggests that given the terms of the defences

in the proposed ss.35G and 35L, consideration should be given to revise the proposed amendment to s.26(2)(a) to require a data user to “take all *reasonably* practicable steps to”.

Proposed Amendment (other than in Part VIA)

Offences for disclosing personal data obtained without consent from data user - s.64

7. This provision has apparently been re-positioned from s.35R to make clear that the offences it creates would apply across-the-board and not be limited to direct marketing under Part VIA. The HKBA believes that this presents greater reason to scrutinize this provision closely.
8. The offences cover the disclosure of personal data held by a data user (without the consent of the data user) which would cause loss or “psychological harm” to the data subject. This offence is a serious one, carrying a maximum penalty of a fine of \$1 million and imprisonment for 5 years.
9. To put things in perspective, the offence of criminal intimidation under s.24 of the Crimes Ordinance (Cap.200) may attract an imprisonment term for a maximum of 5 years (but a fine of only up to \$2,000). Under s.24, "intention to cause alarm" is a clear element of the offence. Some jurisprudence has since developed, for instance, "wild and whirling words from a mere outburst of spleen" is not considered to be sufficient to cause alarm (see *R v. Lo Ting Kai* (CACC No. 178 of 1977) and *HKSAR v. Wong Epaphras Chung Kay* (HCMA No.1142 of 2006)).
10. Given that the causing of "psychological harm" to the data subject is an essential element of the offence under s.64(2), it has to be properly defined to avoid uncertainty. This point has been made by the HKBA in its previous submission dated 30th December 2011 (at para.23(d)). Further, since s.64 does not require proof of intention to cause "psychological harm", that is all the more reason for it to be properly defined.
11. The Constitutional and Mainland Affairs Bureau had responded to the issue in January 2012 (LC Paper No. CB(2)898/11-12(01)), making references to a similar expression used in s.2(1) of the Organized and Serious Crimes Ordinance (Cap. 455) and Schedule 1 of the Child Abduction and Custody Ordinance (Cap. 512).
12. The HKBA considers that these references are not entirely helpful as the former deals with the definition of "organized crime" for the purpose of sentencing under s.27 of Cap. 455 (after the defendant has been convicted of a specified offence) and the latter concerns the court's approach towards granting of order affecting the custody of children (notably under Article 13 of the Hague Convention).

13. None of these deals with the meaning of "psychological harm" as an element of an offence which may attract a substantial fine up to HK\$1m and a term of imprisonment up to 5 years.
14. For the sake of completeness, in United Kingdom, for instance, "*psychological harm*" is referred to in:
 - (a) the Sexual Offences Act 2003 in the consideration of the Court in making a Sexual Offences Prevention Order (under ss.104 and 106(3));
 - (b) the Criminal Justice Act 2003 in the consideration of whether a convicted defendant is a "dangerous offender" for the purpose of sentencing (under Chapter 5).
15. In short, the HKBA considers that the use of the vague expression "psychological harm" as an element of offence with serious penal consequences is inappropriate.

Dated 18th May 2012

Hong Kong Bar Association