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30th December 2011

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

Attn: Mr. Thomas Wong

Dear Sir,

Personal Data (Privacy)(Amendment) Bill 2011

I refer to your letter of 21st November 2011.

Please find herewith a copy of the Submission of the Hong Kong Bar Association dated 30th December 2011 for the consideration of the Bills Committee. The same has been endorsed during the Bar Council Meeting held on 29th December 2011.

Yours sincerely,

Kumar Ramanathan SC
Chairman

Encl.

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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Submission of the Hong Kong Bar Association
on the Personal Data (Privacy) (Amendment) Bill 2011

Preliminary

1. The Personal Data (Privacy) (Amendment) Bill 2011 (the "Bill") was introduced to implement recommendations in the Report on Public Consultation on Review of the Personal Data (Privacy) Ordinance ("PDPO") in respect of which the Hong Kong Bar Association ("HKBA") has previously furnished a submission dated 31st December 2010 (the "2010 Submission").

2. The HKBA welcomes the introduction of those proposed changes to the PDPO in respect of which the HKBA has previously expressed support. However, a number of the recommendations of the HKBA have not been reflected in the Bill. Further, there are some inconsistencies between the views of the HKBA and the way the Bill is drafted.

3. For ease of reference, this submission will be structured in accordance with the sequence of the amendments proposed in the Bill.

Part 2 - Amendments to Personal Data (Privacy) Ordinance (Cap. 486)

Division 1 - Amendments Relating to Provisions on Preliminary Matters

4. The HKBA notes that s.3(2) of the Bill seeks to refine the definition of *"relevant person"* 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).

Division 2 - Amendments Relating to Provisions on Administration

5. 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 (see Para. 31 of the 2010 Submission).

Division 4 - Amendments Relating to Provisions on Data Users Returns and Register of Fata Users

6. 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).

7. However, the criminalisation of *"knowingly or recklessly"* 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 *"under this or any other Ordinance"* in the draft s.14A(3) of PDPO should be spelt out to avoid any confusion or misunderstanding.

8. As to s.9 of the Bill (introducing a new s.15(4A)) relating to criminalisation of *"knowingly or recklessly"* submitting false or misleading information for maintaining the Register of Data Users, the submission in Para. 7 above is repeated *mutates mutandis*.

9. Further, as a matter of general observation, it is better for the penalties of various offences under PDPO to be provided in a centalized 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.

Division 5 - Amendments Relating to Provisions on Access to and Correction of Personal Data

10. 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 (see Para. 40 of the 2010 Submission).

11. The HKBA notes that a new subsection s.20(3)(ea) of the PDPO is proposed stating that *"the data user is entitled under this or and other Ordinance not to disclose the personal data which is the subject of the request"*. 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).

12. Further, a new provision under s.20(5) is to be inserted to allow the *"specified body"* (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 seems appropriate to spell out the temporary exemption pending resolution of the dispute, for instance, in s.20(3)(ea) above.

13. The HKBA notes that the new s.22(1A) 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.

14. As to the recasting of the offence of supplying false or misleading information in making a data correction request for the purpose of making correction (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).

15. The HKBA notes that the supplying of false or misleading information in a data access request for the purpose of having the data user comply with the request also constitutes an offence under the current s.64(2). The rationale for the proposed change is unknown and it seems unjustified.

Division 6 - Amendments Relating to Provision on Matching Procedures and Transfer of Personal Data, etc.

16. 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). The observation in Para. 9 hereinabove is repeated.

Division 7 - Addition of Provisions on Sale and Use of Personal Data

17. In brief, this Division deals with the Sales, Self-use (by data user) and Provision (other than sales) of personal data for directing marketing in substitution of the current s.34 of the PDPO (to be repealed).

18. Whilst a *"opt-out"* scheme is contemplated under the Bill, which is in line with the HKBA's previous objection to a *"opt-in"* scheme (see Para. 9 of the Submission), it is observed that :

(a) the Bill aims at a full scale criminalisation of the activities relating to sales and transfer of personal data for direct marketing as opposed to introducing changes by way of a Code of Practice previously proposed by the HKBA (see Para. 14 of the 2010 Submission);

(b) the proposed fines of $500,000 and $1,000,000 and imprisonment of 3 years and 5 years for offences under this part (to be inserted) in the PDPO far exceed the fine at level 5 ($50,000) under s.34(1)(b)(ii), which is to be repealed, and the views expressed by various quarters in the course of consultation (see Para. 6 of the 2010 Submission).

19. The HKBA had indicated previously that the reference to penalty for offences under the Unsolicited Electronic Messages Ordinance (Cap. 593) is inapt since there is a distinction between *"contravention simpliciter and contravention knowingly"* thereunder (in Paragraph 6 of the 2010 Submission).

20. In contrast, in the proposed amendments, the offences under this division do not make such a distinction and it is provided that only the exercise of *"all reasonable precautions"* and *"due diligence"* would suffice as a defence to avoid the commission of the offence. It is emphasized that the provision of the statutory defence does not dilute the lack of proportionality between the gravamen of offences and the severe penalties.

21. The offences appear to apply across-the-board to all data users, big or small. The HKBA reiterates its support of the previous proposal made during the consultation stage as to the creation of an offence of *"disclosure for profits or malicious purposes"* (see Paras. 15 to 16 of the 2010 Submission).

22. The drastic changes in the approach may be precipitated by the perceived need to introduce law that would punish and deter amidst the "Octopus" incident. However, it has to be borne in mind that a large number of data users, who may be affected, are small to medium sized enterprises with limited means. In reality, in most instances, it is unlikely that the Court will impose a fine anywhere near the statutory maximum. To introduce such a high statutory maximum may be counter-productive bearing in mind the relatively small fines that that are likely to be imposed by the Court in routine cases. It may create a wrong impression giving rise to concern as to effectiveness of enforcement action and prosecution.

23. Without prejudice to the foregoing, the HKBA would make the following observations:

    (a) Section 35C - the lack of precision as to *"other means"* whereby a data subject may object to sale of his personal data may invite unnecessary dispute.

(b) Section 35D(8) - In passing, it appears that the previous proposal of introducing the defence of *"reasonable practicable steps"* having been taken by the data user to an offence pertinent to erasure of data under s.26 has not been included in the Bill (see Para. 42 of the 2010 Submission).

(c) 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 *"other social or health care services"* may be too wide and may lead to abuse. Tightening up of the definition, for instance, by reference to registered members of the "Hong Kong Council of Social Services" and welfare institutions supervised by and/or receiving funding from the Social Welfare Department should be considered.

(d) Section 35R(2)(b) - The meaning of *"psychological harm to the data subject"* as a result of disclosure of personal data obtained without consent may give rise to incessant dispute since psychology is not an exact science and *"psychological harm"* may come in all shades, which are to a large extent subjective and not capable of satisfactory proof in court.

(e) 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.

Division 8 - Amendments to Provisions on Inspection, Complaints and Investigation

24. 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 (see Para. 27 of the 2010 Submission).

25. As to the proposed addition of s.46(2)(b) of the PDPO, the HKBA reiterates its concern that the precise circumstances authorizing the disclosure of personal data

by the Commissioner is not sufficiently spelt out (see Para. 30 of the 2010 Submission).

26. As to the disclosure to foreign authorities under the proposed s.42(7) to (9) of the PDPO, the circumstances necessitating or justifying the disclosure are unclear.

(a) Under normal circumstances, it is up to the relevant overseas judicial authority to make requests for assistance to the Hong Kong Courts in obtaining evidence.

(b) It has previously been suggested that *"crime"* under s.58 of PDPO should be extended to include *"a crime or offence under the law of a place outside Hong Kong in respect of which legal assistance under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) has been sought to obtained"* (see Para. 45 of the 2010 Submission).

(c) It seems that an amendment to s.58 as aforesaid and a corresponding adjustment to the definition of *"offence"* in s.46(2) will be sufficient to provide for the need of the Commissioner to provide personal data to foreign authorities.

(d) The HKBA does not support this amendment.

27. In so far as the word *"may"* 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 (see Para. 29 of the 2010 Submission).

28. 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 *"removal of this obligation where a complaint, albeit subsequently withdrawn,*

has been investigated with findings, comments, recommendations and proposed enforcement actions" (see Para. 28 of the 2010 Submission).

29. 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 (see Para. 24 of the 2010 Submission).

30. 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) (see Paras. 34 to 35 of the 2010 Submission).

31. Without prejudice to Para. 30 hereinabove, it is advisable to clarify and, if appropriate, specify in s.50B(1)(b) that that subsection deals with *"lawful requirement of the Commissioner"* other than that under an enforcement notice, which is governed by s.50A.

Division 9 - Amendments to Provisions on Exemptions

32. The HKBA supports the proposed exemption for judicial officers under the new s.51A (see Para. 44 of the 2010 Submission).

33. 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 the Hong Kong Police and Customs & Excise Department.

34. 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 (see Para. 54 of the 2010 Submission).

35. 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 (see Para. 44 of the 2010 Submission).

Division 10 - Amendments Relating to Provisions on Offences and Compensation

36. The HKBA maintains its objection to the proposed s.64A extending the time-bar for prosecution of offences under the PDPO to 2 years (see Para. 47 of the Submission). 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).

37. 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 (see Para. 53 of the 2010 Submission).

38. 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 *"those expenses"* (meaning legal costs as taxed) constitutes a first charge for the benefit of the Commissioner.

39. It is extraordinary that the *"first charge"* 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.

40. 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.

41. In the related proposed amendment (i.e. s.73F to the District Court Ordinance, Cap. 336 in 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.

42. Further, in so far as it is contemplated that the first charge would be extended to damages recovered by the claimant from the opposing party, it is doubtful whether the legal assistance will be attractive to the aggrieved person. Given that the amount of damages recovered for contravention of the PDPO may not be very substantial, a more cost-effective way of resolving disputes, such as by way of mediation, may need to be considered.

Division 11 - Amendment Relating to Provision in Schedules

43. 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.

Part 3 - Related and Consequential Amendments

Division 1 - Amendment to District Court Ordinance (Cap. 336)

44. See Paragraphs 40 to 41 above.

Other Recommendations of the HKBA - Not Implemented in the Bill

45. The HKBA observes that its recommendations regarding sensitive personal data, in particular, biometric data (see Para. 48 of the 2010 Submission) 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 (see Para. 56 of the 2010 Submission) 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.

Dated: 30th December 2011

HONG KONG BAR ASSOCIATION