

Report on Public Consultation on Review of
the Personal Data (Privacy) Ordinance

Submissions of the Hong Kong Bar Association

1. The Hong Kong Bar Association (“HKBA”) made submissions to the Constitutional Affairs and Mainland Bureau (“CMAB”) on the Consultation Document on Review of the Personal Data (Privacy) Ordinance (“PDPO”) in November 2009.
2. The CMAB released its Report on Public Consultation on Review of the Personal Data (Privacy) Ordinance (“the Report”) in October 2010 and now consults the public on the proposals that the Administration wishes to take forward and those the Administration is not minded to pursue.
3. The Privacy Commissioner for Personal Data (“the Commissioner”) has written to the HKBA during the CMAB’s consultation period to seek the views of the HKBA on what the Commissioner has styled as “four relatively non-controversial items” for the purpose of his submission to the Administration.
4. The HKBA submits its views on the proposals discussed in the Report, including the “items” referred to in the Commissioner’s letter.

Direct Marketing and Related Matters

5. Proposal (1) concerns the collection and use of personal data in direct marketing and consists of several aspects, some controversial and others non-controversial.

6. The HKBA expressed support in November 2009 for raising the penalty for contravention of s 34(1)(b)(ii) of the PDPO to a fine at level 5 (\$50,000). The Administration now proposes raising the said penalty to a fine at \$500,000 and imprisonment for three years, apparently after making reference to the levels of penalties in the Unsolicited Electronic Messages Ordinance (Cap 593). The extent of the proposed increase well exceeds the suggestions of most respondents, appears disproportionate, and makes no distinction, as it is done in the Unsolicited Electronic Messages Ordinance, between contravention simpliciter and contravention knowingly. The HKBA objects to this part of Proposal (1).
7. The Administration indicates in paragraph 3.2.20 of the Report that it maintains the view that it is not appropriate to pursue the “opt-in” proposal or introduce a territory-wide do-not-call register against direct marketing activities. The Commissioner disagrees with the Administration’s position and writes to canvass for his position.
8. The HKBA considers that the Data Protection Principles (“DPP”) in Schedule 1 of the PDPO require in DPP1(3)(b) that the data subject customer is to be explicitly informed and he or she may be explicitly informed through a Personal Information Collection Statement (“PICS”) provided to him or her containing the relevant information; and in DPP1(2) that the collection of personal data must be means that are lawful and fair in the circumstances of the case, and as the Court of First Instance stated in the DPP1(2) case of Cathay Pacific Airways Ltd v Administrative Appeals Board & Anor [2008] 5 HKLRD 539, fairness is a “broad principle and, as to the manner in which personal data is to be collected, is capable of encompassing the form in which relevant information is conveyed as well as the substance of that information”. In the context of direct marketing, section 34 of the PDPO must be considered. And this section has provided a mechanism for post-collection opt-out by the data subject.
9. Having considered these factors, the HKBA supports the part of Proposal (1) that is set out in paragraphs 3.2.32 and 3.2.33 of the Report to impose on data

users who intend to use (including transfer) personal data collected for direct marketing purposes additional specific requirements, enforceable through enforcement notices under the PDPO, regarding the PICS, the presentation of the PICS and the option for an applicant to choose not to agree to the use (including transfer) of his or her personal data for any of the intended direct marketing activities or the transfer of the data to any class of transferees. This expression of support is in general terms and the HKBA reserves the right to comment on the specific text when it is introduced. Additionally, the HKBA questions whether these specific requirements should be introduced by legislation and suggests that adopting a code of practice may be more consonant to the general scheme of the PDPO, which does not mandate the use of a PICS by data users. In other words, the HKBA does not support the “opt-in” proposal advocated by the Commissioner.

10. The HKBA also does not support the “do-not-call” register proposal advocated by the Commissioner. There are competing arguments in favour of and against establishing a “do-not-call” register. The HKBA considers that the social benefits of a “do-not-call” register are outweighed by the regulatory issues and problems that will accompany a “do-not-call” register, as the establishment of a “do-not-call” register is in itself an exercise in collecting personal data and making them available to all interested and intending direct marketing data users. The institutional and resource arrangements necessary to prevent, detect and punish misuse would be substantial but not necessarily effective. In addition, an ineffective “do-not-call” register would only increase the frustration that unsolicited calls cause.

11. It follows from the HKBA’s views above that the HKBA objects to the Administration’s proposal in paragraph 3.2.35 of the Report to create a criminal offence to punish non-compliance with the specific requirements referred to in paragraph 3.2.32 of the Report. Non-compliance of an enforcement notice is already a criminal offence. The HKBA takes the same view as indicated above regarding the proposed penalties.

12. Proposal (2) addresses the issues associated with unauthorized sale of personal data by data users.
13. The HKBA considers that sale (especially in bulk) of collected personal data is unlikely to be the purpose for which personal data are collected or a directly related purpose and therefore a data user should explicitly inform the data subject either at the initial act of collection of personal data or prior to the sale of personal data the intended sale in an understandable and reasonably readable format, so that the data subject may indicate whether he or she agrees or disagrees with the intended sale. Accordingly, the HKBA agrees with the proposal set out in paragraph 3.3.5(a) to (c) of the Report, subject to the clarification of the expression “in kind gain”, which the HKBA believes to be vague and imprecise.
14. However, the HKBA questions whether the requirements in paragraph 3.3.5(a) to (c) of the Report should be introduced by legislation and enforced by criminal prosecutions and suggests that adopting a code of practice may be more consonant to the general scheme of the PDPO. An enforcement notice may be sufficient. Non-compliance of an enforcement notice is already a criminal offence. The HKBA takes the same view as indicated above regarding the proposed penalties.
15. Proposal (3) calls for the enactment of an offence of disclosure for profits or malicious purposes of personal data obtained without the data user’s consent.
16. The HKBA expressed support in November 2009 for the creation of an offence of disclosure for profits or malicious purposes of personal data obtained without the data user’s consent but considered that there should be an express mens rea element in the offence, such as obtaining or procuring the obtaining of personal data and disclosing the personal data with the intention of making a profit thereby and/or to cause harm to a data subject, knowing that the data user that is the source of the personal data has not given consent to the disclosure of the personal data or being reckless as to whether such consent has been given or not. The HKBA maintains these views and adds

that the language of the legislative text to be adopted must define the intended scope of “malicious purposes” with precision; and that the defences referred to in paragraph 3.4.3 of the Report, particularly the defence of disclosure justified in the public interest, should be incorporated.

17. The HKBA had commented on the appropriate level of penalty for the offence of disclosure for profits or malicious purposes of personal data obtained without the data user’s consent in November 2009. The HKBA now considers that maximum penalties of a fine at level 5 and imprisonment for 12 months are appropriate.
18. Proposal (4) seeks to amend section 34 of the PDPO to exclude from the definition of “direct marketing” the offering of social services.
19. Although the HKBA understands and supports the rationale of Proposal (4), the HKBA recognizes that drafting the requisite amendment may be a challenge, bearing in mind that what is proposed to be excerpted from the definition of “direct marketing” is a class of “goods, facilities or services” identified apparently only by the providers thereof.

Data Security

20. Proposal (5) is proposed in light of what the Administration acknowledges as mixed views in the public consultation on the mode of regulation of data processors and sub-contracting activities. The Administration opted for requiring a data user to use contractual or other means to ensure that its data processors and sub-contractors, whether within Hong Kong or offshore, comply with the requirements of the PDPO, with the enforcement measure being enforcement notices.
21. The HKBA had indicated in November 2009 that it did not support the use of contractual or other measures alone to secure compliance with the statutory obligations of the PDPO when contracting out the processing of personal data to third parties. Given the privity of contract, a data subject would not be able to enforce such a requirement. Nor would a data subject have any remedy for

the breach of the requirement as against the data processor. As Proposal (5) now proposes regulation by the Commissioner, the HKBA would express support.

22. Proposal (6) addresses the problem of personal data security breach with a voluntary notification system. The HKBA expressed support of a voluntary notification system in November 2009. This is maintained.
23. Proposal (7) intends to empower the Commissioner with the ability to provide legal assistance to an aggrieved data subject in legal proceedings under section 66 of the PDPO for compensation. The HKBA stated in November 2009 its support for the provision by the Commissioner of legal assistance to claimants under section 66 of the PDPO along the lines of the model under the existing anti-discrimination legislation (see, for example, the Disability Discrimination Ordinance (Cap 487) s 81(2)).
24. Proposal (8) seeks to amend the circumstances under which the Commissioner may issue an enforcement notice after completing an investigation so that the Commissioner may issue an enforcement notice in the absence of evidence of likelihood of a repetition of the contravention of the PDPO, so long as the contravention has caused or is likely to cause damage or distress to the data subject. The HKBA supports this proposal.
25. Proposal (9) is to clarify the power of the Commissioner to direct remedial action in an enforcement notice, so that the Commissioner's power include requiring the data user to desist from doing a certain act or engaging in a certain practice both within a specified period and thereafter. The HKBA supports this proposal.
26. Proposal (10) proposes the removal of the 45-day time limit within which the Commissioner has to notify a complainant if the Commissioner refuses to continue an investigation. While the HKBA appreciates the rationale for seeking the removal of the present time limit and only that time limit, the HKBA considers that having a time limit does focus the mind and that

nonetheless, either a longer statutory time limit should be adopted or the Commissioner should adopt a best practice or performance pledge of the period of time within which his office would make a decision on whether the investigation of a complaint should continue.

27. Proposal (11) considers the inclusion as a ground for the Commissioner to refuse to carry out or continue an investigation the finding that the primary cause of the complaint is not related to personal data privacy. The HKBA supports this proposal.
28. Proposal (12) seeks to remove the obligation of the Commissioner to inform the complainant of the investigation result etc if the complainant has withdrawn his complaint. The HKBA does not understand the rationale for removal of this obligation where a complaint, albeit subsequently withdrawn, has been investigated with findings, comments, recommendations and proposed enforcement actions. Informing the complainant of the results of an investigation is an important facet of accountability. The HKBA objects to this proposal.
29. Proposal (13) is to allow the Commissioner to serve an enforcement notice together with his notification of the result of an investigation. While the HKBA appreciates the need for flexibility on the part of the Commissioner, the HKBA is concerned that the exercise of this liberty may deprive the data user in some circumstances a reasonable opportunity to respond to the Commissioner's statement of the result of an investigation (including the taking of necessary legal action). On balance, the HKBA does not support this proposal.
30. Proposal (14) serves to enable the Commissioner and his prescribed officers to disclose information reasonably necessary for the proper performance of their functions and exercise of their powers. The HKBA supports this proposal only to the extent that the additional circumstances for disclosure now sought to be included must be spelt out in unambiguous and precise terms.

31. Proposal (15) intends to provide for immunity for the Commissioner and his prescribed officers from personal liability for acts done or omissions made in good faith in the exercise or purported exercise of statutory functions. The HKBA supports this proposal.
32. Proposal (16) considers that the Commissioner should be able to impose reasonable charges for undertaking educational or promotional activities or services. The HKBA does not object to this proposal.
33. Proposal (17) is to empower the Commissioner to obtain information from any person in order to verify the information in a data user return. The HKBA notes that the related provision in the PDPO, namely section 14, has yet been invoked but does not object to this proposal.

Offences and Sanctions

34. Proposal (18) proposes to criminalize repeated contravention of a DPP on the same facts, for which the Commissioner has issued an enforcement notice. The HKBA indicated its support for this proposal in November 2009. This is maintained. The HKBA also maintains its view that the penalty should be less than a breach of an enforcement notice and the suggestion that that penalty should be a fine at level 5.
35. Proposal (19) seeks to impose heavier penalty on a data user for repeated non-compliance with an enforcement notice. The HKBA objected to this proposal in November 2009 and regrets that its objection has not been duly noted in the Report. The Administration has continued to disregard sentencing principles when advocating this proposal. The HKBA repeats: In line with usual sentencing principles, if someone is proved to have contravened an enforcement notice more than once, this should (all other things being equal) result in a heavier penalty imposed up to the prescribed maximum than would be imposed on someone who has done so only once. The HKBA continues to object to this proposal.

Rights of Data Subjects

36. Proposal (20) aims to empower a specified third party to give consent to the change of use of personal data of certain classes of data subjects when it is in their best interests to do so. The proposal now covers two classes: minors and mentally incapacitated persons. The HKBA supports this proposal.
37. Proposal (21) considers adding a provision to prohibit the disclosure of a document containing personal data that is the subject of a disputed data access request from being disclosed prior to the resolution of the dispute by the Administrative Appeals Board, a magistrate or a court. The HKBA supports this proposal.

Rights and Obligations of Data Users

38. Proposal (22) serves to add a provision to the PDPO so that a data user can refuse to comply with a data access request where the data user is obliged to or entitled under any other Ordinances not to disclose the personal data.
39. The HKBA is of the view this proposal brings into focus the fundamental nature of the PDPO, a matter that has not been much considered by the Administration and during the public consultation. The intention of the PDPO was to uphold the right of personal data privacy, including the right of a data subject to control of personal data relating to him or her held by a data user. This should remain the intention of the PDPO notwithstanding the removal of the so-called “overriding provision” of section 3(2) of the PDPO by the Standing Committee of the National People’s Congress by its Decision made pursuant to Article 160 of the Basic Law of the HKSAR in February 1997. Any qualification to the right of personal data privacy should be specific and well-defined within the PDPO itself, rather than in other Ordinances that seek to promote different policies. The HKBA objects to this proposal. Instead, the HKBA calls for a particular provision in the PDPO that lists the statutory provisions and common law duties of confidentiality examined to be appropriate restrictions to the right of personal data privacy. Reference in this regard is made to the column of Professor Johannes Chan SC (Hon) in *Ming Pao* (8 December 2010), D5.

40. Proposal (23) seeks to require a data user to inform a requestor for access to personal data in writing in 40 days if he does not hold the requested personal data and to exempt the police force from complying with the requirement to reply in writing if a requestor for criminal conviction records has a clear record. The HKBA supports this proposal.
41. Proposal (24) aims to amend DPP1(3) to permit a data user to provide the job title or the name of the individual to whom data access or correction requests may be made. The HKBA supports this proposal.
42. Proposal (25) proposes that a data user would be regarded as having complied with the duty to erase personal data if he can prove that he has taken all reasonably practicable steps to erase obsolete personal data. The HKBA supports this proposal.
43. Proposal (26) is to amend DPP4 to make it explicit that a data user is required to take all reasonably practicable steps to prevent the loss of personal data. The HKBA supports this proposal.

Introducing New Exemptions

44. The HKBA supports proposals (27) (transfer of personal data in business mergers or acquisition), (28) (provision of identity and location data on health grounds), (29) (handling personal data in emergency situations), (30) (transfer of personal data of minors relevant to parental care and guardianship), (31) (use of personal data required or authorized by law or related to legal proceedings), (32) (transfer of records for archival purpose), (33) (refusal to comply with a data access request on ground of self-incrimination), and (34) (exemption of personal data held by the court or a judicial officer).

Miscellaneous Proposed Amendments

45. Proposal (35) seeks to add a definition of “crime” to clarify the scope of section 58 of the PDPO. The HKBA considers that the definition should be in terms that refer to a crime under the laws of Hong Kong and 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 and obtained.

46. Proposal (36) aims to expand the definition of “relevant person” under section 2 of the PDPO to include the guardians of data subjects who are mentally incapacitated persons. The HKBA supports this proposal.
47. Proposal (37) proposes the lengthening of the time limit for laying information for prosecution from six months to two years. The HKBA does not support this proposal and suggests that time limit be extended to one year.

Proposals Not to be Taken Forward

48. The HKBA regrets that the Administration does not wish to pursue the proposal to subject sensitive personal data (particularly biometric data) to more stringent regulation. This is an approach lagging behind the European Union, Australia, Japan, South Korea, Taiwan and Macau. The Administration should implement the proposal instead. The Commissioner is correct to continue to advocate for more stringent regulation of sensitive personal data.
49. The HKBA agrees with the Administration’s decision not to pursue the proposal to confer the Commissioner with the power to carry out criminal investigations and prosecutions.
50. The HKBA agrees with the Administration’s decision not to empower the Commissioner to determine the amount of compensation to a data subject who suffers damage by reason of a contravention of a requirement under the PDPO by a data user. Accordingly, the HKBA disagrees with the Commissioner in relation to this matter.
51. The HKBA agrees with the Administration’s decision not to pursue the proposal to make contravention of a DPP a criminal offence.
52. The HKBA agrees with the Administration’s decision not to pursue the proposal to empower the Commissioner to require data users to pay monetary

penalty for serious contraventions of DPPs. Accordingly, the HKBA disagrees with the Commissioner in relation to this matter.

53. On the other hand, the HKBA suggests that the Administration may give consideration to permitting the Commissioner to use his good offices to facilitate resolution of a dispute between a data subject and a data user by conciliation or mediation.
54. The HKBA regrets that the Administration decides not to pursue the proposal to permit a data user to refuse a data access request made by a “relevant person” on behalf of a minor in order to protect the interests of minors. Reference in this regard is made to the column of Professor Johannes Chan SC (Hon) in *Ming Pao* (8 December 2010), D5.
55. The HKBA expresses no opinion of the Administration’s decision not to pursue the proposal with respect to the charging of fees for handling data access requests.
56. The HKBA wishes to take this opportunity to repeat its proposal that data users be relieved from the obligation to redact the name or other information explicitly identifying another individual as the source of personal data that are the subject of a data access request when complying with the request if it is reasonable in all the circumstances for the data user to believe the requestor knows who the source is or would be able to infer this from a copy of the data from which the name or other information explicitly identifying the source have been redacted. For the explanation of this proposal, see the Submissions of the Hong Kong Bar Association on the Consultation Document on Review of the Personal Data (Privacy) Ordinance (November 2009) (available at: <http://www.hkba.org/whatsnew/submission-position-papers/2009/20091116.pdf>), paragraph 19.

Dated 31 December 2010.

HONG KONG BAR ASSOCIATION