

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

<p>Report on review of PDPO – October 2010</p>	<p>Law Society's comments – December 2010</p>
<p><i>(A) Proposals to be Taken Forward Direct Marketing and Related Matters</i></p>	
<p><b>Proposal (1): Collection and Use of Personal Data in Direct Marketing</b></p>	<p><b>The Law Society notes this is a new proposal which had not been recommended in the consultation document published by the CMAB in August 2009.</b></p> <p>The provisions relating to the use (including transfer) of personal data collected for direct marketing purposes will be tightened to include the following:-</p> <p>(a) data user's personal collection statements (PICS) should be "reasonably specific about the intended marketing activities including the classes of person to whom the data may be transferred for direct marketing purposes and that kinds of data be transferred".</p> <p>(b) Presentation of the information in the pics should be</p>

	<p>understandable and reasonably readable by the general public.</p> <p>(c) An opt-out rather than an opt-in system on the use of data.</p> <p><b>The Law Society submits:</b></p> <ol style="list-style-type: none"> <li>1. <b>The system should be opt-in rather than opt-out.</b></li> <li>2. <b>Any extended use of the data it should be prohibited:</b> If a data user wishes to use the data collected for marketing purposes, then it must clarify whether there will be any wider use in the PICS, otherwise such activity would be an unauthorised use.</li> <li>3. <b>The overriding principle is for the public to be informed on the use of the personal data <i>before</i> the data user has any legal right to pass such data to any third parties.</b></li> </ol> <p>Non-compliance with the requirements in (a) to (c) will be subject to a fine of HK\$500,000 and imprisonment for 3 years subject to the issue of an enforcement notice by the Privacy Commissioner for Personal Data (PCPD).</p> <p><b>No comments</b></p>
<p><b>Proposal (2): Unauthorised Sale of Personal Data by Data User</b></p>	<p><b>The recommendation is to introduce the following requirements in relation to unauthorised sale namely:</b></p> <p><b>Sub-paragraph (a) if a data user is to sell personal data (whether collected from the data subject direct by the data user or combined from other source) to another person.</b>  <i>“for a monetary or in-kind gain ....”</i></p> <p><b>The Law Society notes the concept of “in-kind” is difficult. Will this cover joint marketing projects?</b></p>

	<p>We recommend:</p> <ol style="list-style-type: none"> <li>1. The word “<i>gain</i>” would be clearer than the concept of “in-kind”.</li> <li>2. We support the introduction of the proposals on unauthorised sale of personal data.</li> </ol>
<p><b>Proposal (3): Disclosure for Profits or Malicious Purposes of Personal Data Obtained without the Data User’s Consent</b></p>	<p>No comment.</p>
<p><b>Proposal (4): Excluding Social Services from the Definition of “Direct Marketing”</b></p>	<p>The Law Society supports the proposal to amend Section 4 of the PDPO to exclude from the definition “direct marketing” the offering of social services and facilities by social workers to individual in need of such services and facilities. However, the drafting of such amendment should ensure that the exemption covers the work of Non-Government Organisations (NGOs) as many of the social workers are in fact employed by NGOs.</p>
<p><i>Data Security</i></p>	
<p><b>Proposal (5): Regulation of Data Processors and Sub-contracting Activities</b></p>	<p>No comments.</p>
<p><b>Proposal (6): Personal Data Security Breach Notification</b></p>	<p>No comment.</p>
<p><i>Statutory Powers and Functions of the PCPD</i></p>	
<p><b>Proposal (7): Legal Assistance to Data Subjects under Section 66</b></p>	<p>The Law Society notes the Government must provide adequate resources to the PDPC to ensure assistance can be provided to aggrieved data subjects.</p>

<b>Proposal (8): Circumstances for Issue of an Enforcement Notice</b>	<b>No comment.</b>
<b>Proposal (9): Clarifying Power to Direct Remedial Steps in an Enforcement Notice</b>	<b>No comment.</b>
<b>Proposal (10): Removing the Time Limit to Discontinue an Investigation</b>	<b>The Law Society agrees with the proposal to remove the current time limit of 45 days but notes there is no recommended time limit to discontinue the investigation.</b>
<b>Proposal (11): Additional Grounds for Refusing to Investigate</b>	<b>The Law Society recommends a time limit of 6 months should be imposed.</b>
<b>Proposal (12): Relieving the PCPD's Obligation to Notify the Complainant who has withdrawn his Complaint of Investigation Result</b>	<b>No comment.</b>
<b>Proposal (13): PCPD to Serve an Enforcement Notice together with the Result of Investigation</b>	<b>No comment.</b>
<b>Proposal (14): PCPD to Disclose Information in the Performance of Functions</b>	<b>No comment.</b>
<b>Proposal (15): Immunity for the PCPD and his Prescribed Officers from being Personally Liable to Lawsuit</b>	<b>No comment.</b>
<b>Proposal (16): Power to Impose Charges for Educational and Promotional Activities</b>	<b>No comment.</b>

<p><b>Proposal (17): Power to Obtain Information to Verify a Data User Return</b></p>	<p>The Law Society re-iterates its observations that the purpose of verifying the information in a data user return, the PCPD is exercising “a general inspection power comparable to inspection powers under Section 36 rather than the investigation powers under Section 38 with the PDPO”.</p>
<p><i>Offences and Sanctions</i></p>	
<p><b>Proposal (18): Repeated Contravention of a Data Protection Principle on Same Facts</b></p>	<p>No comment.</p>
<p><b>Proposal (19): Repeated Non-compliance with Enforcement Notice</b></p>	<p>No comment.</p>
<p><b>Rights of Data Subjects</b></p>	
<p><b>Proposal (20): Third Party to Give Prescribed Consent to Change of Use of Personal Data</b></p>	<p>No comment.</p>
<p><b>Proposal (21): Access to Personal Data in Dispute</b></p>	<p>No comment.</p>
<p><i>Rights and Obligations of Data Users</i></p>	
<p><b>Proposal (22): Refusal to Comply with a Data Access Request on Ground of Compliance with Other Legislation</b></p>	<p>No comment.</p>
<p><b>Proposal (23): Response to Data Access Requests in Writing and within 40 days</b></p>	<p>No comment.</p>

<b>Proposal (24): Contact Information about the Individual who Receives Data Access or Correction Requests</b>	No comment.
<b>Proposal (25): Erasure of Personal Data</b>	No comment.
<b>Proposal (26): Duty to Prevent Loss of Personal Data</b>	No comment.
<i>Introducing New Exemptions</i>	
<b>Proposal (27): Transfer of Personal Data in Business Mergers or Acquisition</b>	No comment.
<b>Proposal (28): Provision of Identity and Location Data on Health Grounds</b>	No comment.
<b>Proposal (29): Handling Personal Data in Emergency Situations</b>	No comment.
<b>Proposal (30): Transfer of Personal Data of Minors Relevant to Parental Care and Guardianship</b>	No comment.
<b>Proposal (31): Use of Personal Data Required or Authorised by Law or Related to Legal Proceedings</b>	No comment.
<b>Proposal (32): Transfer of Records for Archival Purpose</b>	No comment.
<b>Proposal (33): Refusal to Comply with a Data Access Request on Ground of Self-Incrimination</b>	No comment
<b>Proposal (34): Exemption for Personal Data Held by the Court or Judicial Officer</b>	We repeat our observations made in November 2009 that all the Exemptions contained in the PDPO are either very specific (stating

	<p>which Section of the ordinance or which DPP is not to apply in what situation) or very limited in scope. This is so even for very serious issues such as safeguarding the security of Hong Kong. If a full scale exemption to the PDPO is to be given to the court or judicial officers, we expect a detailed rationale for the proposal. Furthermore, some provisions in the PDPO should apply to all data users (such as DPP4 – security of personal data) and this has nothing to do with judicial independence and immunity.</p> <p>Absent appropriate justification, the Law Society objects to the proposed full scale exemption of the PDPO to the court or judicial officers.</p> <p>The Law Society notes the proposal is one of the absolute immunity to the Judiciary. Whilst the Law Society agrees that judicial functions, for example as posting up notices for administrative reasons be exempted, this proposal is too wide and cannot be justified. Exclusion of the Judiciary from the general application of the data protection principles will not affect judicial independence as provided for an article 85 of the Basic Law.</p>
<p><i>Miscellaneous Proposed Amendments</i></p>	
<p><b>Proposal (35): Definition of Crime under Section 58</b></p>	<p>No comment.</p>
<p><b>Proposal (36): Expanding the Definition of “Relevant Person”</b></p>	<p>No comment.</p>
<p><b>Proposal (37): Extending the Time Limit for Laying Information for Prosecution</b></p>	<p><b>The Law Society repeats its submissions dated November 2009:</b> The reasons given in the Consultation Document apply to all offences and there is no justification why the time limit should be increased from 6 months to 2 years. If, from past experience the PCPD has difficulty laying information for prosecution within the 6-month time limit, we suggest that</p>

	<p>the time limit be extended to <u>one year rather than two years. There should be a balance between convenience to the PCPD and the anxiety to the party being investigated.</u></p> <p>As breach of the PDPO may not be disclosed until some time after the event, the time period should run from when the PCDP becomes aware of the offence.</p>
<b><i>B Proposals NOT to be Taken Forward</i></b>	
<b>Sensitive Personal Data</b>	<b>No comment.</b>
<b>Proposal (38): Sensitive Personal Data</b>	<b>No comment.</b>
<b>Statutory Powers and Functions of the PCPD</b>	
<b>Proposal (39): Granting Criminal Investigation and Prosecution Power to the PCPD</b>	<b>No comment.</b>
<b>Proposal (40): Empowering the PCPD to Award Compensation to Aggrieved Data Subjects</b>	<b>No comment.</b>
<b><i>Offences and Sanctions</i></b>	
<b>Proposal (41): Making Contravention of a Data Protection Principle an Offence</b>	<b>No comment.</b>
<b>Proposal (42): Imposing Monetary Penalty on Serious Contravention of Data Protection Principles</b>	<b>No comment.</b>
<b><i>Access to Personal Data</i></b>	



<b>Proposal (43): Parents' Right to Access Personal Data of Minors</b>	<b>No comment.</b>
<b>Proposal (44): Fee Charging for Handling Data Access Requests</b>	<b>No comment.</b>

**The Law Society of Hong Kong**  
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