The Summit on the Greater Bay Area Data Interconnection and Secure Development

Regulatory Framework for Personal Data Protection Practices and Cross-border/boundary Data Flow in Hong Kong

05 January 2020 | Hengqing, Zhuhai









Constitutional protection to privacy in Hong Kong





Hong Kong Bill of Rights Ordinance, Cap 383

Enacted in 1991

Mirror-imaging the provisions of the International Covenant on Civil and Political Rights

Protection against arbitrary or unlawful interference with privacy, family, home or correspondence [Art. 14] (A mirror image of Art. 17 of the ICCPR)







The Basic Law – Examples of Privacy Rights Protection

Provisions of the International Covenant on Civil and Political Rights, etc. remain in force [Art. 39]

Guarantee freedom and privacy of communication [Art. 30] Prohibit arbitrary
or unlawful
search of, or
intrusion into, a
resident's home
or other premises
[Art. 29]







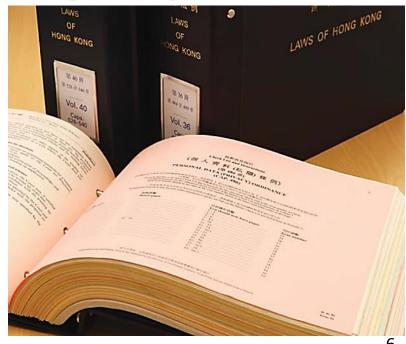
Data Protection Regime in Hong Kong





Personal Data (Privacy) Ordinance Cap 486, Laws of Hong Kong

- Enacted in 1995
- Protects individuals' privacy in relation to personal data
- Created independent Privacy Commissioner for Personal Data
- Covers the public (including the government) and private sectors
- Referenced to 1980 OECD Privacy Guidelines and 1995 EU Data Protection Directive







Legislative Background

Business Perspective

- Facilitate business environment
- Maintain Hong Kong as a financial and trading hub

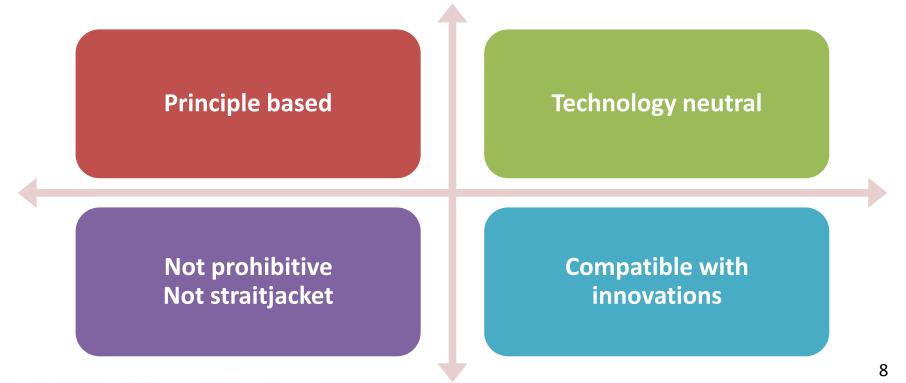
Human Rights Perspective

Protect individuals' personal data privacy





Characteristics of the Ordinance







Role of the PCPD

An independent regulatory body

Headed by the Privacy Commissioner (appointed by the Chief Executive of HKSAR)

Performs the functions and exercises the power conferred by the Ordinance, e.g.:

- Education
- Enforcement
- Research
- Advice on legislation
- International liaison



Key Provisions of the Ordinance





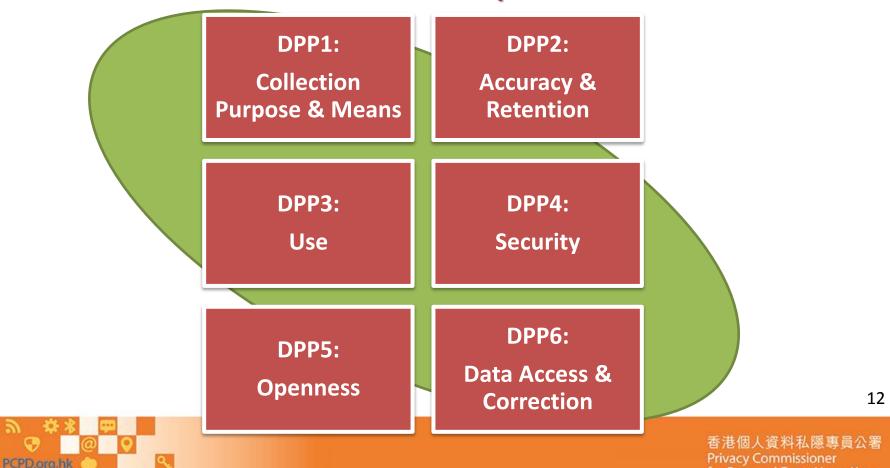
1. What is "Personal Data"?

"Personal data" (個人資料) means any <u>data</u> -

- (a) relating directly or indirectly to a living individual;
- (b) from which it is practicable for the <u>identity</u> of the individual to be directly or indirectly ascertained; and
- (c) in a <u>form</u> in which access to or processing of the data is practicable.

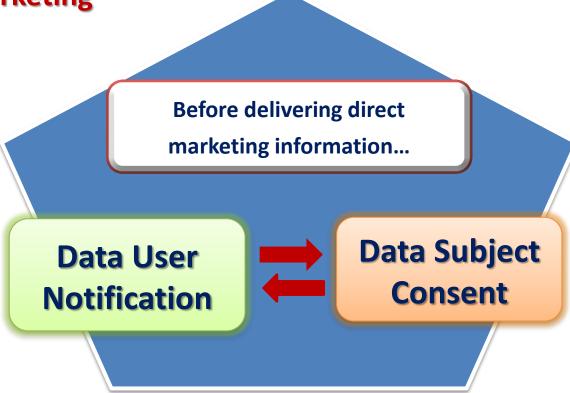


2. The Six Data Protection Principles of the Ordinance



for Personal Data, Hong Kong

3. Direct Marketing





4. Exemptions under PDPO – Examples (Conditions apply)

Activity	Exempted provision
Domestic Purposes (s.52)	All DPPs
Security of Hong Kong (s.57)	DPP 3, DPP 6
Crimes prevention / detection (s.58)	DPP 3, DPP 6
Health (s.59)	DPP 3, DPP 6
Legal professional privilege (s.60)	DPP 6
Legal proceedings & legal requirements (s.60B)	DPP 3
News (s.61)	DPP 3, DPP 6
Statistics & research (s.62)	DPP 3
Crimes prevention / detection, news activities & public interest (s.64(4)) (statutory defence)	S.64(1)&(2)





Criminal Offences under PDPO - Examples

Examples of Offence	Max. fine	Max. imprisonment
Direct marketing (Part 6A)	HK\$1 million	5 years
Disclosing personal data without data user's consent for monetary gain or causing psychological harm (s. 64)	HK\$1 million	5 years
Non-compliance with enforcement notice (s.50A)	HK\$50,000	2 years
Failure to comply with requirements of the Privacy Commissioner (s.50B)	HK\$10,000	6 months







Current status of crossborder/boundary data transfer in Hong Kong





Cross-border/boundary Data Transfer – PDPO S.33 (Not yet in force)

Legislative intent:

Data transferred out will have adequate protection

Effect:

Restriction on cross-border/boundary data transfer

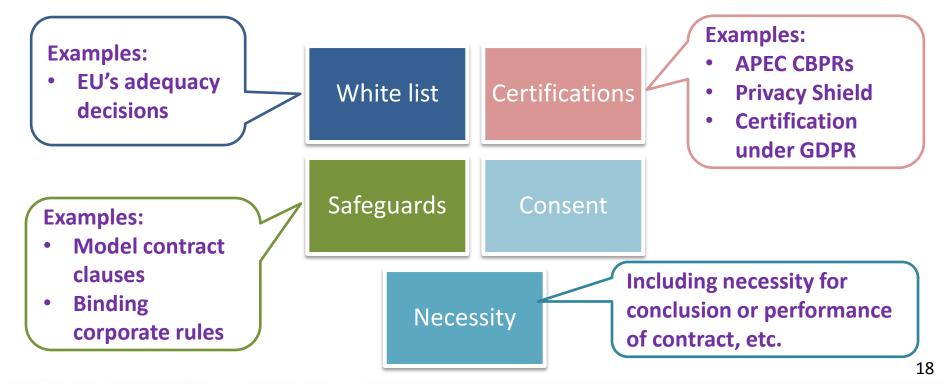
Exceptions

(See next slide)





Common models (legal bases) for cross-border / boundary data transfer





Section 33 of Personal Data Privacy Ordinance (PDPO) [Not yet in force]

- ➤ Transfer of personal data outside HK is prohibited <u>except</u> under any one of the following specified circumstances:-
- 1 Transfer to places specified in "White List" [s.33(2)(a)]
 - 2 Adequate data protection regime in the destined jurisdiction [s.33(2)(b)]
 - **3** Written consent by data subjects [s.33(2)(c)]
 - Transfer for avoidance and mitigation of adverse action against data subjects [s.33(2)(d)]
 - 5 Use of personal data is exempted from DPP 3 (use limitation) [s.33(2)(e)]
- Reasonable precautions and due diligence taken by data users (e.g. contract clauses) [s.33(2)(f)]







Why is s.33 implementation deferred?

Concern from businesses about impact on operations



e.g. Impact on international trade and online sales



Concern from businesses about difficulties in compliance, especially SMEs



e.g. Lack of resources and legal knowledge



Businesses demanded guidance from PCPD



Guidance Note was issued by the PCPD in December 2014



Businesses demanded more time to implement measures to comply



Existing protection under PDPO without s.33 in operation

DPP 3 prohibits transfer of personal data for new purposes without consent S.65(2) holds data users liable for the acts of their agents, including overseas service providers personal data longer than necessary

personal data transferred to their processors



Existing protection under PDPO without s.33 in operation

Even if s.33 is not in force, for data transferred from other jurisdictions to Hong Kong, parties can impose contractual restrictions on onward transfer to places outside Hong Kong.



Recent work by PCPD and HKSAR Government on s.33

2015

To address businesses' demand for guidance, PCPD issued Guidance Note on compliance with requirements of s.33, with a set of model contract clauses recommended



More concerns raised by businesses in response to the

Guidance Note

e.g.-

- Unclear about the definition of "personal data" and "transfer"
- Difficult for SMEs to impose contract clauses to services providers?
- What if a "White Listed" region is subsequently delisted?
- Lack of resources to monitor service providers abroad
- Lack of information about the location of cloud servers



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Recent work by PCPD and HKSAR Government on s.33

2015-2016

Government commissioned a consultant to conduct a Business Impact Assessment (BIA) Study on implementation of s.33



PCPD rendered comments to the consultant on the interpretation, application and compliance issues of s.33



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Recent work by PCPD and HKSAR Government on s.33

2018

Seven issues of concerns raised by Government's consultant in the BIA Study which require further studies



PCPD engaged a consultant to explore how restriction on cross-border data transfer may be implemented in light of these seven issues of concerns







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The seven issues of concerns

1. How "transfer" under s.33 and "personal data" are to be defined

2. The mechanism for reviewing and updating the "white list" under s.33

3. Whether the adoption of existing rules and standards in highly regulated industries (e.g., financial industry) would allow a data user to be regarded as having met the requirements of s.33



The seven issues of concerns

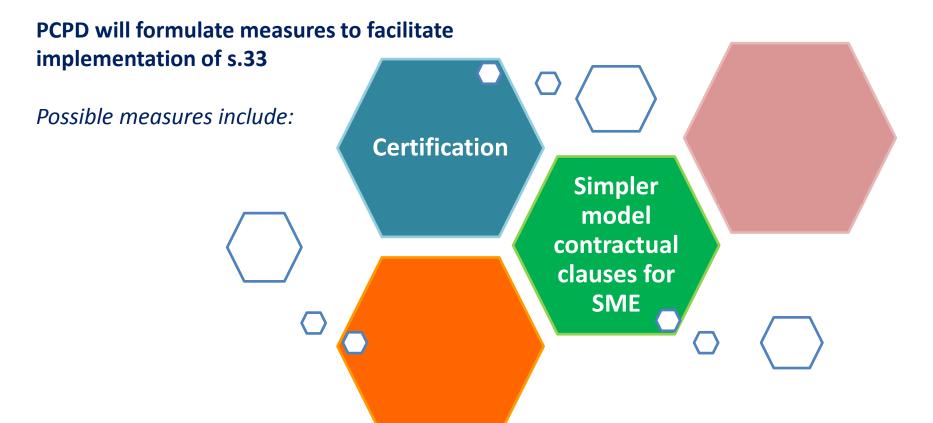
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- 4. The ancillary measures or alternatives to facilitate the implementation of s.33

5. Enforcement issues of s.33 and means to tackle them

6. The criteria or yardsticks for deciding whether a data user has "taken all reasonable precautions and exercised all due diligence" under s.33

7. Suggestions on the forms of support or guidance from the PCPD to help businesses understand and comply with the requirements of s.33





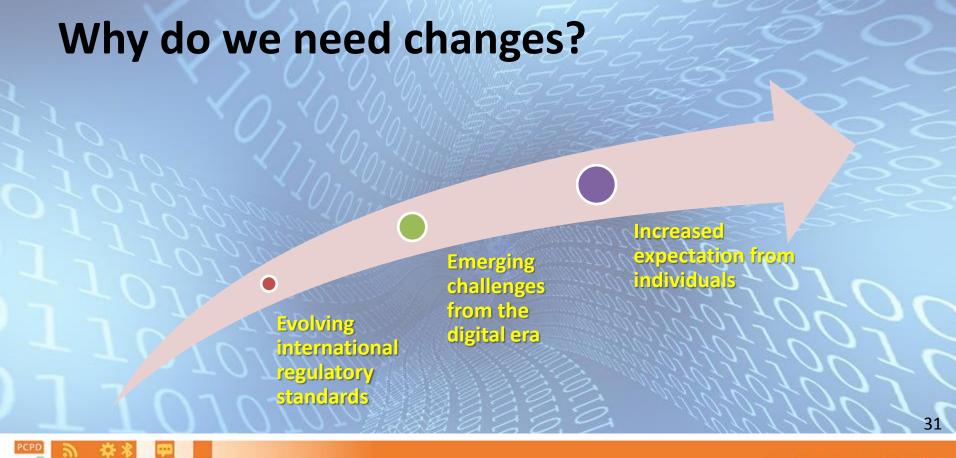




Paradigm shift in personal data protection practice and possible reforms of the PDPO











From Compliance

To Accountability

To
Data Ethics



Spirit

Institutionalise organisational and technical measures to ensure and demonstrate compliance

Rationale

Organisations are in the best position to identify, assess and address the privacy risks of their activities

Objectives

- Privacy by design and by default
- Good data governance and stewardship from cradle to grave





Possible amendments to PDPO:

(1) Expand the definition of 'personal data' under PDPO:

Personal data may include:

- Information practicable to ascertain an identity (direct/indirect); and
- Information *relating to an identifiable* person



Definitions of "personal data"

PDPO	Overseas (e.g. AU, CA, EU)
Practicable to <u>ascertain identity</u>	Criteria: Relating to or about an identifiable individual
Meaning:Knowing who a person is	 Meaning: Able to <u>single out</u> a person, not necessarily knowing who the person is
Result: • Narrower scope of personal data and less protection to privacy	Result: Wider scope of personal data and stronger protection to privacy



Possible amendments to PDPO (cont.)

(2) Additional regulation on the retention of personal data

- Disclose personal data retention policy
- Stipulation of maximum retention period



Possible amendments to PDPO (cont.)

(3) Regulate data processors directly

Data processors' obligations on:

- retention period of personal data
- security of personal data
- notification to data users of data breaches without undue delay
- Data processors with a Hong Kong link or a presence in Hong Kong will be covered





Possible amendments to PDPO (cont.)

(4) Mandatory Breach Notification

- Notify both the PCPD and the impacted individuals
- High threshold for breach notification e.g. "real risk of significant harm" to individuals
- Set **time limit** e.g. 5 days for notifying PCPD; 'as soon as practicable' for notifying individuals
- Allow for investigation period for 'suspected breach' before notification



Possible amendments to PDPO (cont.)

(5) PCPD's Powers

Confer additional powers on the PCPD to:

- Conduct criminal investigations/prosecutions
- Impose administrative fines
- Make prohibitive orders by way of interim enforcement notices binding on any relevant parties





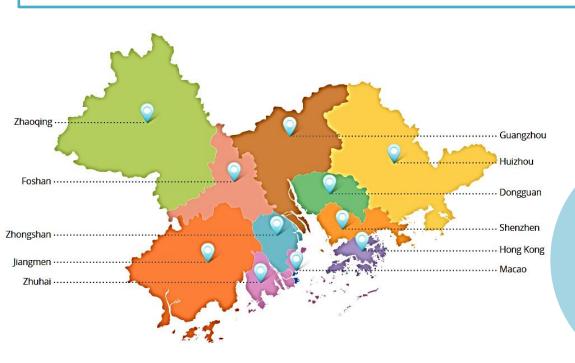
Data in the Greater Bay Area: Unique and irreplaceable attributes of Hong Kong





Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area

《粤港澳大灣區發展規劃綱要》



International financial and trade centres

Hong Kong's Roles

International legal and dispute resolution services

Innovation and technology industries



Data & GBA

Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area 《粤港澳大灣區發展規劃綱要》

Data-related, regional collaborations



Facilitate cross-boundary and regional flow of people, goods, capital and information

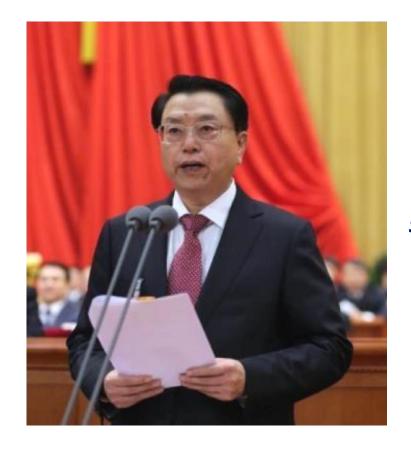
Jointly develop a Greater Bay Area big data centre

Formulate plan to enhance management on crossboundary use of medical data and bio-samples

Explore the establishment of common standards, open up data ports, develop interconnected public application platforms







Hong Kong...has many unique

attributes...for instance, free and open economy, efficient business environment, advanced professional services sector, well-established infrastructure and facilities, internationally recognised legal system, free flow of information and large supply of quality professionals...

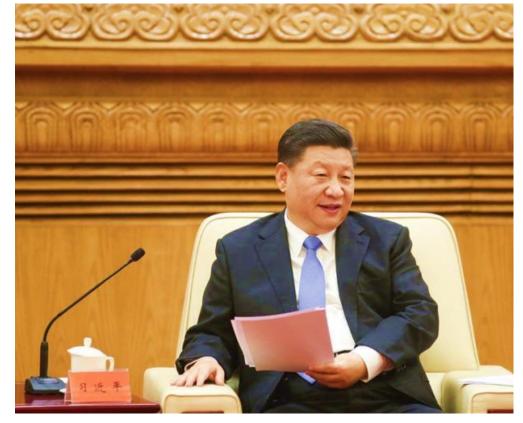
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Mr ZHANG Dejiang,

Chairman of the Standing Committee of the National People's Congress of the PRC, Keynote Speech, Belt and Road Summit, 18 May 2016







In the country's reform and opening in the new era, Hong Kong and Macao still possess special, unique and irreplaceable attributes.

"

Xi Jinping, President of China

Speech at the meeting with Hong Kong delegation in the Celebration of the 40th Anniversary of the Reform and Opening Up of the Country

12 November 2018







Think tank: Hong Kong can become a global data hub for the **Greater Bay Area**

Global businesses that rely on big data are in need of a "neutral" hub to help bridge divergences in the digital systems of China... Hong Kong is an obvious location.



[Hong Kong] already has in place stringent data privacy laws and legal protections that mainland and international firms can trust.

Victor Fung, Chairman of The 2022 Foundation

Source: The Standard (29 March 2019)

http://www.thestandard.com.hk/breaking-news.php?id=125179&sid=4





"Hong Kong has unique functions in the Greater Bay Area. ... Support Hong Kong to become an international innovation centre. ... Hong Kong should apply its advantage in professional services in the development of the Greater Bay Area."

Han Zheng

Vice Premier of the State Council; March 2019

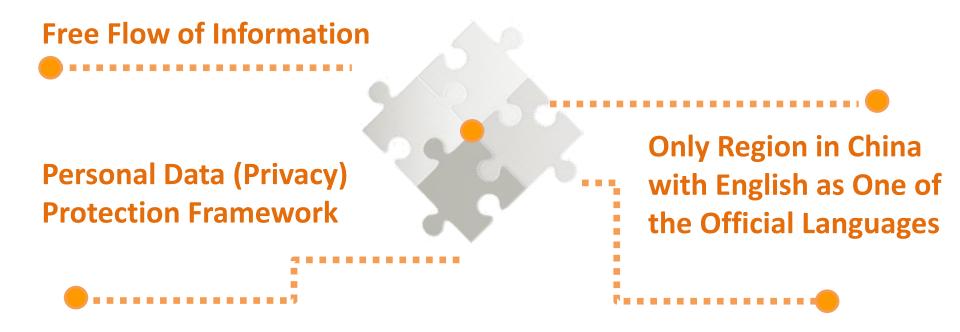


Source: xinhuanet.com; March 2019



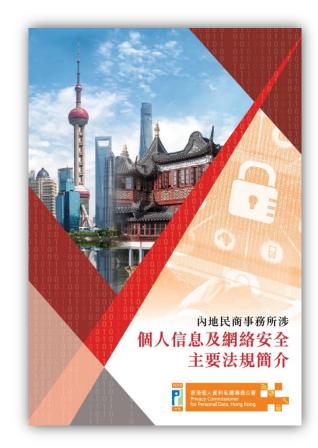


Unique & Irreplaceable Attributes of Hong Kong









PCPD publication on mainland personal information regulation

《内地民商事務所涉個人信息及網絡安全主要法規簡介》

Objectives

- Provide an overview of related regulations
- Serve as a handy kit to help the business sector operating in GBA
- Promote cross-boundary data flow and development of data economy





Comparison between PDPO and Data Protection Laws in the mainland of China

	《個人資料(私隱)條例》	內地相關法規
立法目的	在個人資料方面保障個人的私隱。	視乎不同法規而定。 例如《網絡安全法》的主要目的為保障網絡、國家及社會安全,維護公民、法人和其他 組織的合法權益,促進經濟社會信息化健康發展。《數據安全管理辦法》(徵求意見 稿)的目的包括保障個人信息和重要數據安全。
規管對象	資料使用者,即就個人資料而言,獨自或聯同其他人或與其 他人共同控制該資料的收集、持有、處理或使用的人。	例如《網絡安全法》、《數據安全管理辦法》(徵求意見稿)和《兒童個人信息網絡保護規定》規管網絡運營者,《電子商務法》規管電子商務經營者,《消費者權益保護法》規管向消費者提供商品和服務的經營者。
個人資料 /個人信息的定義	個人資料是指(1)直接或間接與一名在世的個人有關的任何資料,(2)而從該資料直接或間接地確定有關的個人的身分是切實可行,以及(3)該資料的存在形式必須是令查閱及處理均是切實可行的。	按《網絡安全法》,個人信息是指以電子或者其他方式記錄的能夠單獨或者與其他信息 結合識別自然人個人身份的各種信息。 按最高人民法院及最高人民檢察院聯合公布的解釋,以及《個人信息安全規範》(徵求 意見稿),個人信息還包括可反映特定自然人活動情況的各種信息。
個人敏感信息	然而,《條例》附表1的保障資料第4原則的某些規定,可應	

	《個人資料(私隱)條例》	內地相關法規
收集	《條例》附表1的保障資料第1原則規定,資料使用者須以合法和公平的方式收集他人的個人資料,收集目的須為合法目的並須是必需或直接與資料使用者的職能或活動有關,所收集的資料必須不超乎適度。	《網絡安全法》規定,收集、使用個人信息,應當遵循合法、正當、必要的原則,必須取得被收集者的同意。不得收集與提供的服務無關的個人信息。 《數據安全管理辦法》(徵求意見稿)規定在收集個人信息時須向個人提供收集及使用個人信息的規則,並禁止以改善服務品質、提升用戶體驗、定向推送信息、研發新產品等為由,以預設授權、功能捆綁等形式強迫、誤導個人同意其收集個人信息。 如收集的屬個人敏感信息,《數據安全管理辦法》(徵求意見稿)規定須向所在地的網信部門備案,而《個人信息安全規範》(徵求意見稿)則建議要取得個人的「明示同意」。 《兒童個人信息網絡保護規定》要求收集和使用兒童個人信息前,須告知兒童的監護人,並取得監護人的同意。
使用及披露	個人資料的目的必須屬收集時的目的或直接有關的目的,否則須先取得 資料當事人的同意。	《網絡安全法》規定,收集、使用個人信息,應當遵循合法、正當、必要的原則,必須取得被收集者的同意。 《數據安全管理辦法》(徵求意見稿)規定使用個人信息時,不得違反向個人說明了的收集、使用規則。如因業務需要,確需擴大個人信息使用範圍,須徵得個人同意。若要向第三方披露個人信息,須先評估安全風險,並取得個人同意。 《兒童個人信息網絡保護規定》要求收集和使用兒童個人信息前,須告知兒童的監護人,並取得監護人的同意。
	《條例》附表1的保障資料第1原則規定,資料使用者須採取所有切實可行的步驟,以確保在收集個人資料之時或之前,資料當事人獲告知收集 其個人資料的目的、資料可能會被轉移給哪類人士、資料當事人是否有 責任提供資料,及不提供資料的後果。	《網絡安全法》及《數據安全管理辦法》(徵求意見稿)規定要公開收集、使用規則,明示收集、使用信息的目的、方式和範圍等。 《兒童個人信息網絡保護規定》要求設置專門的兒童個人信息保護規則和用戶協議,有關規則和協議應當簡潔、易懂。

	《個人資料(私隱)條例》	內地相關法規
保安	《條例》附表1的保障資料第4原則規定 - 資料使用者須採取所有切實可行的步驟,以確保由其持有的個人資料受保障而不受未獲准許的或意外的查閱、處理、刪除、喪失或使用所影響。 • 如聘用資料處理者代為處理個人資料,資料使用者須採取合約規範方法或其他方法,以防止轉移予資料處理者作處理的個人資料未獲准許或意外地被查閱、處理、刪除、喪失或使用。	《數據安全管理辦法》(徵求意見稿)要求網絡運營者參照國家相關標準,建立 數據安全管理制度,制定數據安全計劃,實施數據安全技術防護(例如數據分
	《條例》附表1的保障資料第2(2)原則規定,資料使用者須採取所有切實可行的步驟,以確保個人資料的保存時間不超過為貫徹使用該資料之目的而所需的時間。 《條例》第26條規定,資料使用者須採取所有切實可行步驟,刪除不再需要的個人資料。	按《數據安全管理辦法》(徵求意見稿),個人信息保存期不應超出收集使用 規則中的保存期限。 《電子商務法》規定在用戶註銷帳戶後立即刪除有關用戶的信息。
準確性	《條例》附表1的保障資料第2(1)原則規定- 資料使用者須採取切實可行的步驟以確保持有的個人資料準確無誤。 若有合理理由相信個人資料不準確時,資料使用者須確保該資料不會被使用或會被刪除。 若知悉向第三者披露的個人資料在要項上不準確時,資料使用者須確保第三者獲告知,及獲提供所需詳情以令第三者能更正。	
問責制	《條例》沒有相關規定。 私隱專員鼓勵資料使用者實行「私隱管理系統」以實踐問責制。	《網絡安全法》規定網絡運營者應當對其收集的個人信息嚴格保密,並建立健全的信息保護制度。 《數據安全管理辦法》(徵求意見稿)明確要求開展數據安全風險評估,制定網絡安全事件應急預案,並組織數據安全教育、培訓。 《兒童個人信息網絡保護規定》要求有指定專人負責兒童個人信息保護。 《個人信息安全規範》(徵求意見稿)建議任命專職的個人信息保護負責人和設立個人信息保護工作機構,負責個人信息安全工作。

	《個人資料(私隱)條例》	内地相關法規
外洩通報	《條例》沒有相關規定。 私隱專員鼓勵資料使用者發現個人資料外洩時通報受影響人士及相關規管 / 執法機構。	《網絡安全法》、《電子商務法》、《兒童個人信息網絡保護規定》、《數據安全管理辦法》(徵求意見稿)及《個人信息出境安全評估辦法》(徵求意見稿)均規定在發生或者可能發生個人信息洩露或其他信息安全事故時,應當立即向有關主管部門報告,甚或通知受影響的個人。 《網絡安全威脅信息發布管理辦法》(徵求意見稿)規定,任何企業、組織或個人在發布網
		絡安全威脅信息前,應事先向相關網信部門及公安機關報告。
	《條例》第33條規管 (1) 在香港收集、持有、處理或使用的個人資料,或(2) 主要業務地點在香港的資料使用者,控制收集、持有、處理或使用的個人資料。	《網絡安全法》規定「關鍵信息基礎設施的運營者」須將個人信息及重要數據儲存在中國內地。如要出境,須進行安全評估。
	該條規定,除非符合《條例》下的指明條件(例如得到資料當事人的書面同意,或資料使用者已採取所有合理的預防措施及已作出所有應作出的努力, 以對個人資料提供足夠的保護),否則受規管的個人資料不得轉移離開香港。但相關規定尚未實施。	
個性化及自動決策	《條例》沒有就個性化及自動決策,特定給予相關定義及作出相關規定。	《電子商務法》規定如果電子商務經營者向個人提供個性化的商品或服務的搜尋結果,須容許個人關閉此個性化推薦的功能。
	然而,《條例》第30至32條規管「核對程序」,而有關程序可能會應用於個性化的操作。	《數據安全管理辦法》(徵求意見稿)規定如網絡運營者向個人推送個性化的新聞信息、商業廣告等,應當以明顯方式標明「定推」字樣,並提供停止接收定向推送信息的選項。
	「核對程序」指符合以下全部四項準則的程序: (1)有關程序將兩套為不同目的而收集的個人資料加以核對; (2)每一項比較涉及十個或以上資料當事人; (3)比較並非以人手方法進行; (4)核對資料的結果可即時或在將來用來對有關資料當事人採取不利行動。	《個人信息安全規範》(徵求意見稿)建議在進行會對個人信息主體權益造成顯著影響的自動決策前,須開展個人信息安全影響評估,並且向個人信息主體提供針對自動決策結果的申訴管道。
	除非獲資料當事人或私隱專員同意,資料使用者不得進行「核對程序」。	
查閱及更正權	《條例》第18及22條,及附表1的保障資料第6原則訂明,資料當事人有權向 資料使用者要求查閱個人資料,及要求改正不準確的個人資料。	《網絡安全法》規定個人有權要求網絡運營者更正錯誤的個人信息。 《數據安全管理辦法》(徵求意見稿)規定網絡運營者要遵從個人查閱及更正個人信息的要
		《数據女王自生辦/公》(個本总允侗)
		《電子商務法》規定電子支付服務提供者須向使用者免費提供最近三年的交易記錄。

	《個人資料(私隱)條例》	內地相關法規
刪除權	資料當事人沒有明確的權利要求刪除其個人資料。 然而,《條例》第26條及附表1的保障資料第2(2)原則規定,資料使用 者須採取所有切實可行步驟,刪除不再需要的個人資料。	按《網絡安全法》,如網絡運營者違規收集或使用個人信息,個人有權要求網路運營者將信息刪除。 《數據安全管理辦法》(徵求意見稿)亦規定網絡運營者要在合理的代價和時間內遵從個人刪除個人信息的要求。
執法機構 執法機構	私隱專員	沒有單一、指定的執法機構。視乎行業和案件性質,執法機構可以為網信辦、公安部、工信部或其他主管部門。
罰則	違反《條例》的某些規定亦構成刑事罪行,違者可判罰款甚至監禁。	例如違反《網絡安全法》的規定可被責令改正,並根據情節嚴重程度而處以警告、沒收違法所得(如有)、處以罰款(最高為違法所得的十倍或100萬元)、對直接負責的主管人員和其他直接責任人員處以最高10萬元罰款,甚或責令暫停相關業務、停業整頓、關閉網站、吊銷相關業務許可證或營業執照。如構成犯罪的,依法追究刑事責任。
民事索償		

PCPD's Roles – <u>Enforcer</u> + <u>Educator</u> + <u>Facilitator</u>











