

Personal Data (Privacy) (Amendment) Bill 2011

Committee Stage

Amendments to be moved by the Secretary for Constitutional and Mainland Affairs

- | <u>Clause</u> | <u>Amendment Proposed</u> |
|---------------|---|
| 1 | <p>By deleting subclause (2) and substituting—</p> <p>“(2) Subject to subsection (3), this Ordinance comes into operation on 1 October 2012.</p> <p>(3) Sections 20, 21, 37(2), 38 and 42 come into operation on a day to be appointed by the Secretary for Constitutional and Mainland Affairs by notice published in the Gazette.”.</p> |
| 3 | <p>By adding before subclause (1)—</p> <p>“(1A) Section 2(1)—</p> <p>Repeal the definition of <i>data user return</i></p> <p>Substitute</p> <p>“<i>data user return</i> (資料使用者申報表) means a return submitted to the Commissioner under section 14(4) and, if applicable, corrected under section 14A(5);”.</p> |
| 3 | <p>By adding—</p> <p>“(2A) Section 2(1), in the Chinese text, in the definition of</p> <p><i>Committee</i>—</p> <p>Repeal</p> <p>“會。”</p> <p>Substitute</p> <p>“會；”.</p> |
| 3(3) | <p>By adding—</p> |

“*change notice* (變更通知) means a notice served on the Commissioner under section 14(8) and, if applicable, corrected under section 14A(5);”.

4 By deleting subclause (2).

7 By deleting subclause (1) and substituting—

“(1) Section 14(4)—

Repeal

“data user return”

Substitute

“return”.

(1A) Section 14(5)(b), in the English text—

Repeal

“be obtained by”.

(1B) Section 14(7), in the English text—

Repeal

“be obtained by”.

(1C) Section 14(9)(a), after the semicolon—

Add

“and”.

(1D) Section 14(9)(b)—

Repeal

“; and”

Substitute a full stop.

(1E) Section 14(9)—

Repeal paragraph (c).”.

7(3) In the proposed section 14(11), by deleting “submitted to, or notice served on, the Commissioner” and substituting “or change notice”.

8 In the proposed section 14A(1), by deleting everything after “data user return” and substituting—

“or change notice, the Commissioner may, by written notice served on any of the persons specified in subsection (2), reasonably require the person—

(a) to provide any document, record, information or thing

specified in the written notice; and

- (b) to respond in writing to any question specified in the written notice.”.

8 In the proposed section 14A(2)(b), by adding “or change notice” after “data user return”.

8 In the proposed section 14A(3), by deleting “this or”.

8 In the proposed section 14A(4), by deleting everything after “subsection (1), the Commissioner” and substituting “has reasonable grounds to believe that any information in a data user return or change notice is inaccurate, the Commissioner may, by written notice, require the data user to correct the information in the data user return or change notice.”.

8 In the proposed section 14A(5), by deleting “the period” and substituting “such reasonable period as is”.

8 In the proposed section 14A, by adding—

- “(5A) A person who contravenes subsection (5) commits an offence and is liable on conviction to a fine at level 3.”.

8 In the proposed section 14A, by adding—

- “(7) A data user who, in purported compliance with a notice under subsection (4), knowingly or recklessly in a data user return or change notice supplies any information which is false or misleading in a material particular, commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months.”.

9 By adding—

“(1A) Section 15—

Repeal subsection (1)

Substitute

“(1) The Commissioner must keep and maintain a register

of data users who have submitted data user returns, using information in those returns and in any change notices.

(1B) Section 15(2)(b)—

Repeal

“under section 14(4), such particulars of the information supplied in that return”

Substitute

“, such particulars of the information supplied in that return and any change notice”.

(1C) Section 15(3)—

Repeal

“prescribed form”

Substitute

“specified form”.

11(2) In the proposed section 18(5)(a), in the English text, by deleting “informing” and substituting “inform”.

11(2) In the proposed section 18(5)(b), in the English text, by deleting “supplying” and substituting “supply”.

13(3) In the proposed section 20(3)(ea), by deleting “disclose the personal data which is the subject of” and substituting “comply with”.

21 By deleting the proposed Part VIA and substituting—

“Part VIA

Use of Personal Data in Direct Marketing and Provision of Personal Data for Use in Direct Marketing

Division 1

Interpretation

35A. Interpretation of Part VIA

(1) In this Part—

consent (同意), in relation to a use of personal data in direct marketing or a provision of personal data for use in direct marketing, includes an indication of no objection to the use or provision;

direct marketing (直接促銷) means—

- (a) the offering, or advertising of the availability, of goods, facilities or services; or
- (b) the solicitation of donations or contributions for charitable, cultural, philanthropic, recreational, political or other purposes, through direct marketing means;

direct marketing means (直接促銷方法) means—

- (a) sending information or goods, addressed to specific persons by name, by mail, fax, electronic mail or other means of communication; or
- (b) making telephone calls to specific persons;

marketing subject (促銷標的), in relation to direct marketing, means—

- (a) any goods, facility or service offered, or the availability of which is advertised; or
- (b) any purpose for which donations or contributions are solicited;

permitted class of marketing subjects (許可類別促銷標的), in relation to a consent by a data subject to an intended use or provision of personal data, means a class of marketing subjects—

- (a) that is specified in the information provided to the data subject under section 35C(2)(b)(ii) or 35J(2)(b)(iv); and
- (b) in relation to which the consent is given;

permitted class of persons (許可類別人士), in relation to a consent by a data subject to an intended provision of personal data, means a class of persons—

- (a) that is specified in the information provided to the data subject under section 35J(2)(b)(iii); and
- (b) in relation to which the consent is given;

permitted kind of personal data (許可種類個人資料), in relation to a consent by a data subject to an intended use or provision of personal data, means a kind of personal data—

- (a) that is specified in the information provided to the data subject under section 35C(2)(b)(i) or 35J(2)(b)(ii); and
- (b) in relation to which the consent is given;

response channel (回應途徑) means a channel provided by a data user to a data subject under section 35C(2)(c) or 35J(2)(c).

- (2) For the purposes of this Part, a person provides

personal data for gain if the person provides personal data in return for money or other property, irrespective of whether—

- (a) the return is contingent on any condition; or
- (b) the person retains any control over the use of the data.

Division 2

Use of Personal Data in Direct Marketing

35B. Application

This Division does not apply in relation to the offering, or advertising of the availability, of—

- (a) social services run, subvented or subsidized by the Social Welfare Department;
- (b) health care services provided by the Hospital Authority or Department of Health; or
- (c) any other social or health care services which, if not provided, would be likely to cause serious harm to the physical or mental health of—
 - (i) the individual to whom the services are intended to be provided; or
 - (ii) any other individual.

35C. Data user to take specified action before using personal data in direct marketing

- (1) Subject to section 35D, a data user who intends to use a data subject's personal data in direct marketing must take each of the actions specified in subsection (2).
- (2) The data user must—
 - (a) inform the data subject—
 - (i) that the data user intends to so use the personal data; and
 - (ii) that the data user may not so use the data unless the data user has received the data subject's consent to the intended use;
 - (b) provide the data subject with the following information in relation to the intended use—
 - (i) the kinds of personal data to be used; and
 - (ii) the classes of marketing subjects in relation to which the data is to be used; and
 - (c) provide the data subject with a channel through which the data subject may, without

charge by the data user, communicate the data subject's consent to the intended use.

- (3) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.
- (4) The information provided under subsection (2)(a) and (b) must be presented in a manner that is easily understandable and, if in written form, easily readable.
- (5) Subject to section 35D, a data user who uses a data subject's personal data in direct marketing without taking each of the actions specified in subsection (2) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (6) In any proceedings for an offence under subsection (5), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
- (7) In any proceedings for an offence under subsection (5), the burden of proving that this section does not apply because of section 35D lies on the data user.

35D. Circumstances under which section 35C does not apply

- (1) If, before the commencement date—
 - (a) a data subject had been explicitly informed by a data user in an easily understandable and, if informed in writing, easily readable manner of the intended use or use of the data subject's personal data in direct marketing in relation to a class of marketing subjects;
 - (b) the data user had so used any of the data;
 - (c) the data subject had not required the data user to cease to so use any of the data; and
 - (d) the data user had not, in relation to the use, contravened any provision of this Ordinance as in force as at the time of the use,

then section 35C does not apply in relation to the intended use or use, on or after the commencement date, of the data subject's relevant personal data, as updated from time to time, in direct marketing in relation to the class of marketing subjects.

- (2) If—
 - (a) a data subject's personal data is provided to a data user by a person other than the data subject (*third person*); and
 - (b) the third person has by notice in writing to the data user—
 - (i) stated that sections 35J and 35K have

been complied with in relation to the provision of data; and

- (ii) specified the class of marketing subjects in relation to which the data may be used in direct marketing by the data user, as consented to by the data subject,

then section 35C does not apply in relation to the intended use or use by the data user of the data in direct marketing in relation to that class of marketing subjects.

- (3) In this section—

commencement date (本部生效日期) means the date on which this Part comes into operation;

relevant personal data (有關個人資料), in relation to a data subject, means any personal data of the data subject over the use of which a data user had control immediately before the commencement date.

35E. Data user must not use personal data in direct marketing without data subject's consent

- (1) A data user who has complied with section 35C must not use the data subject's personal data in direct marketing unless—
 - (a) the data user has received the data subject's consent to the intended use of personal data, as described in the information provided by the data user under section 35C(2)(b), either generally or selectively;
 - (b) if the consent is given orally, the data user has, within 14 days from receiving the consent, sent a written confirmation to the data subject, confirming—
 - (i) the date of receipt of the consent;
 - (ii) the permitted kind of personal data; and
 - (iii) the permitted class of marketing subjects; and
 - (c) the use is consistent with the data subject's consent.
- (2) For the purposes of subsection (1)(c), the use of personal data is consistent with the data subject's consent if—
 - (a) the personal data falls within a permitted kind of personal data; and
 - (b) the marketing subject in relation to which the data is used falls within a permitted class of marketing subjects.

- (3) A data subject may communicate to a data user the consent to a use of personal data either through a response channel or other means.
- (4) A data user who contravenes subsection (1) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

35F. Data user must notify data subject when using personal data in direct marketing for first time

- (1) A data user must, when using a data subject's personal data in direct marketing for the first time, inform the data subject that the data user must, without charge to the data subject, cease to use the data in direct marketing if the data subject so requires.
- (2) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.
- (3) A data user who contravenes subsection (1) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (4) In any proceedings for an offence under subsection (3), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

35G. Data subject may require data user to cease to use personal data in direct marketing

- (1) A data subject may, at any time, require a data user to cease to use the data subject's personal data in direct marketing.
- (2) Subsection (1) applies irrespective of whether the data subject—
 - (a) has received from the data user the information required to be provided in relation to the use of personal data under section 35C(2); or
 - (b) has earlier given consent to the data user or a third person to the use.
- (3) A data user who receives a requirement from a data subject under subsection (1) must, without charge to the data subject, comply with the requirement.
- (4) A data user who contravenes subsection (3) commits an offence and is liable on conviction to a fine of

\$500,000 and to imprisonment for 3 years.

- (5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
- (6) This section does not affect the operation of section 26.

35H. Prescribed consent for using personal data in direct marketing under data protection principle 3

Despite section 2(3), where a data user requires, under data protection principle 3, the prescribed consent of a data subject for using any personal data of the data subject in direct marketing, the data user is to be taken to have obtained the consent if the data user has not contravened section 35C, 35E or 35G.

Division 3

Provision of Personal Data for Use in Direct Marketing

35I. Application

- (1) This Division does not apply if a data user provides, otherwise than for gain, personal data of a data subject to another person for use by that other person in offering, or advertising the availability, of—
 - (a) social services run, subvented or subsidized by the Social Welfare Department;
 - (b) health care services provided by the Hospital Authority or Department of Health; or
 - (c) any other social or health care services which, if not provided, would be likely to cause serious harm to the physical or mental health of—
 - (i) the individual to whom the services are intended to be provided; or
 - (ii) any other individual.
- (2) This Division does not apply if a data user provides personal data of a data subject to an agent of the data user for use by the agent in carrying out direct marketing on the data user's behalf.

35J. Data user to take specified action before providing personal data

- (1) A data user who intends to provide a data subject's personal data to another person for use by that other person in direct marketing must take each of the actions specified in subsection (2).
- (2) The data user must—

- (a) inform the data subject in writing—
 - (i) that the data user intends to so provide the personal data; and
 - (ii) that the data user may not so provide the data unless the data user has received the data subject's written consent to the intended provision;
 - (b) provide the data subject with the following written information in relation to the intended provision—
 - (i) if the data is to be provided for gain, that the data is to be so provided;
 - (ii) the kinds of personal data to be provided;
 - (iii) the classes of persons to which the data is to be provided; and
 - (iv) the classes of marketing subjects in relation to which the data is to be used; and
 - (c) provide the data subject with a channel through which the data subject may, without charge by the data user, communicate the data subject's consent to the intended provision in writing.
- (3) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.
 - (4) The information provided under subsection (2)(a) and (b) must be presented in a manner that is easily understandable and easily readable.
 - (5) A data user who provides personal data of a data subject to another person for use by that other person in direct marketing without taking each of the actions specified in subsection (2) commits an offence and is liable on conviction—
 - (a) if the data is provided for gain, to a fine of \$1,000,000 and to imprisonment for 5 years; or
 - (b) if the data is provided otherwise than for gain, to a fine of \$500,000 and to imprisonment for 3 years.
 - (6) In any proceedings for an offence under subsection (5), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

35K. Data user must not provide personal data for use in direct marketing without data subject's consent

- (1) A data user who has complied with section 35J must not provide the data subject's personal data to another person for use by that other person in direct marketing unless—
 - (a) the data user has received the data subject's written consent to the intended provision of personal data, as described in the information provided by the data user under section 35J(2)(b), either generally or selectively;
 - (b) if the data is provided for gain, the intention to so provide was specified in the information under section 35J(2)(b)(i); and
 - (c) the provision is consistent with the data subject's consent.
- (2) For the purposes of subsection (1)(c), the provision of personal data is consistent with the data subject's consent if—
 - (a) the personal data falls within a permitted kind of personal data;
 - (b) the person to whom the data is provided falls within a permitted class of persons; and
 - (c) the marketing subject in relation to which the data is to be used falls within a permitted class of marketing subjects.
- (3) A data subject may communicate to a data user the consent to a provision of personal data either through a response channel or other written means.
- (4) A data user who contravenes subsection (1) commits an offence and is liable on conviction—
 - (a) if the data user provides the personal data for gain, to a fine of \$1,000,000 and to imprisonment for 5 years; or
 - (b) if the data user provides the personal data otherwise than for gain, to a fine of \$500,000 and to imprisonment for 3 years.
- (5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

35L. Data subject may require data user to cease to provide personal data for use in direct marketing

- (1) A data subject who has been provided with information by a data user under section 35J(2)(b) may, at any time, require the data user—
 - (a) to cease to provide the data subject's personal data to any other person for use by that other person in direct marketing; and

- (b) to notify any person to whom the data has been so provided to cease to use the data in direct marketing.
- (2) Subsection (1) applies irrespective of whether the data subject has earlier given consent to the provision of the personal data.
- (3) A data user who receives a requirement from a data subject under subsection (1) must, without charge to the data subject, comply with the requirement.
- (4) If a data user is required to notify a person to cease to use a data subject's personal data in direct marketing under a requirement referred to in subsection (1)(b), the data user must so notify the person in writing.
- (5) A person who receives a written notification from a data user under subsection (4) must cease to use the personal data in direct marketing in accordance with the notification.
- (6) A data user who contravenes subsection (3) commits an offence and is liable on conviction—
 - (a) if the contravention involves a provision of personal data of a data subject for gain, to a fine of \$1,000,000 and to imprisonment for 5 years; or
 - (b) in any other case, to a fine of \$500,000 and to imprisonment for 3 years.
- (7) A person who contravenes subsection (5) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (8) In any proceedings for an offence under subsection (6) or (7), it is a defence for the data user or person charged to prove that the data user or person took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
- (9) This section does not affect the operation of section 26.

35M. Prescribed consent for providing personal data for use in direct marketing under data protection principle 3

Despite section 2(3), where a data user requires, under data protection principle 3, the prescribed consent of a data subject for providing any personal data of the data subject to another person for use in direct marketing, the data user is taken to have obtained the consent if the data user has not contravened section 35J, 35K or 35L.”.

New

By adding—

“23A. Section 45 amended (Protection of witnesses, etc.)

Section 45(1), after “but any”—

Add

“enactment or”.”.

24 By deleting subclause (1) and substituting—

“(1) Section 46(1)—

Repeal

“and (3)”

Substitute

“, (3), (7) and (8)”.”.

24(3) In the proposed section 46(2)(a), by adding “subject to subsection (8),” before “disclosing”.

24(7) By deleting the proposed section 46(7) and (8) and substituting—

“(7) The Commissioner may, for the purpose of enabling or assisting an authority of a place outside Hong Kong to perform a relevant function of that authority, disclose matters to that authority, if—

(a) that authority has undertaken to be bound by the secrecy requirements imposed by the Commissioner; and

(b) in the opinion of the Commissioner, there is in force in that place any law which is substantially similar to, or serves the same purposes as, this Ordinance.

(8) The Commissioner may, for the proper performance of the Commissioner’s functions or the proper exercise of the Commissioner’s powers under this Ordinance, disclose matters to an authority of a place outside Hong Kong that performs a relevant function, if—

(a) that authority has undertaken to be bound by the secrecy requirements imposed by the Commissioner; and

(b) any of the conditions specified in subsection (9) is satisfied.

(8A) In subsections (7) and (8)—

relevant function (有關職能), in relation to an authority of a place outside Hong Kong, means a function relating to investigation into a suspected contravention, and enforcement, of legal or regulatory requirements in that place concerning the protection of privacy of individuals in relation to personal data.”.

24(7) In the proposed section 46(9)(e), in the Chinese text, by deleting “擁有” (whenever appearing) and substituting “持有”.

- 27(1) In the proposed section 50(1), by adding “and, if appropriate, prevent any recurrence of ” after “to remedy”.
- 27(1) By deleting the proposed section 50(1A)(a), (b) and (c) and substituting—
- “(a) state that the Commissioner is of the opinion referred to in subsection (1) and the reason for that opinion;
 - (b) specify—
 - (i) the requirement which, in the opinion of the Commissioner, is being or has been contravened; and
 - (ii) the act or omission that constitutes the contravention;
 - (c) specify the steps that the data user must take (including ceasing any act or practice) to remedy and, if appropriate, prevent any recurrence of the contravention;”.
- 27 By deleting subclauses (4) and (5) and substituting—
- “(4) Section 50(3)—
Repeal the section
Substitute
 “(3) The steps specified in an enforcement notice to remedy and, if appropriate, prevent any recurrence of any contravention to which the notice relates may be framed—
 - (a) to any extent by reference to any approved code of practice; and
 - (b) so as to afford the relevant data user a choice between different ways of remedying and, if appropriate, preventing any recurrence of the contravention.”.
- 28 In the proposed section 50B(1)(a), (b) and (c), by deleting “any other person” and substituting “a prescribed officer”.
- 28 In the proposed section 50B(1)(a) and (c)(i) and (ii), in the English text, by deleting “that other person” and substituting “the officer”.
- 32 In the proposed section 59A(1), in the English text, by deleting “of a minor” and substituting “of the minor”.
- 32 By deleting the proposed section 59A(2).

- 33 In the proposed section 60A(1) and (2), by adding “a request under” before “a provision of”.
- 33 In the proposed section 60B(a), by adding “, by any rule of law” after “enactment”.
- 34 In the proposed section 63B(3), by deleting “sale, transfer or disclosure” and substituting “transfer, disclosure or provision for gain”.
- 34 In the proposed section 63B(6), by deleting the definition of *sell*.
- 34 In the proposed section 63B(6), by adding—
- “*provision for gain* (為得益而提供), in relation to personal data, means provision of the data in return for money or other property, irrespective of whether—
- (a) the return is contingent on any condition; or
- (b) the person who provides the data retains any control over the use of the data.”.
- 34 By deleting the proposed section 63C(2).
- 34 By deleting the proposed section 63D(1) and substituting—
- “(1) Personal data contained in records that are transferred to the Government Records Service is exempt from the provisions of data protection principle 3, when the records are used for archive purposes.”.
- 35 By deleting the clause and substituting—
- “35. Section 64 substituted**
Section 64—
- Repeal the section**
Substitute
- “64. Offences for disclosing personal data obtained without consent from data users**
- (1) A person commits an offence if the person discloses any personal data of a data subject which was obtained from a data user without the data user’s consent, with an intent—
- (a) to obtain gain in money or other

- property, whether for the benefit of the person or another person; or
- (b) to cause loss in money or other property to the data subject.
- (2) A person commits an offence if—
- (a) the person discloses any personal data of a data subject which was obtained from a data user without the data user’s consent; and
 - (b) the disclosure causes psychological harm to the data subject.
- (3) A person who commits an offence under subsection (1) or (2) is liable on conviction to a fine of \$1,000,000 and to imprisonment for 5 years.
- (4) In any proceedings for an offence under subsection (1) or (2), it is a defence for the person charged to prove that—
- (a) the person reasonably believed that the disclosure was necessary for the purpose of preventing or detecting crime;
 - (b) the disclosure was required or authorized by or under any enactment, by any rule of law or by an order of a court;
 - (c) the person reasonably believed that the data user had consented to the disclosure; or
 - (d) the person—
 - (i) disclosed the personal data for the purpose of a news activity as defined by section 61(3) or a directly related activity; and
 - (ii) had reasonable grounds to believe that the publishing or broadcasting of the personal data was in the public interest.”.”.

36 In the heading, by deleting “**Section 64A**” and substituting “**Sections 64A and 64B**”.

36 By renumbering the proposed section 64A as section 64B.

36 By adding before the proposed section 64B—

“64A. Miscellaneous offences

- (1) A data user who, without reasonable excuse, contravenes any requirement under this Ordinance commits an offence and is liable on conviction to a fine at level 3.
- (2) Subsection (1) does not apply in relation to—
 - (a) a contravention of a data protection principle;
 - (b) a contravention that constitutes an offence under section 14(11), 14A(5A) or (6), 15(4A) or (7), 18(5), 22(4), 31(4), 32(5), 44(10), 46(10), 50A(1) or (3), 50B(1), 63B(4) or 64(1) or (2); or
 - (c) a contravention of any requirement under Part VIA.”.

38 In the proposed section 66A(2)(b), in the Chinese text, by deleting “鑠” and substituting “爍”.

39(19) In the proposed section 2(3), in the Chinese text, by deleting “手段或其他手段” and substituting “規範方法或其他方法”.

39(26) In the proposed section 4(2), in the Chinese text, by deleting “手段或其他手段” and substituting “規範方法或其他方法”.