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# Personal Data (Privacy) (Amendment) Bill 2011

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# A BILL

## To

Amend the Personal Data (Privacy) Ordinance to provide for the regulation of the sale of personal data and the use of personal data in direct marketing; to create a new offence for the disclosure of personal data obtained without consent; to empower the Privacy Commissioner for Personal Data to assist data subjects in bringing proceedings to seek compensation from data users under the Ordinance; to empower the Commissioner to verify the accuracy of data user returns and to impose certain charges; to give the person appointed to be the Commissioner and persons employed or engaged by the Commissioner immunity from civil liability in respect of certain actions or omissions; to impose a heavier penalty for repeated contravention of enforcement notices and to create a new offence for repeated contravention of the requirements under the Ordinance for which enforcement notices have been served; to introduce new exemptions in respect of certain requirements under the Ordinance; to make new provisions relating to data protection principles; to make technical amendments to improve the operation and presentation of the Ordinance; and to provide for related and consequential matters.

Enacted by the Legislative Council.

Part 1

Clause 1

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## **Part 1**

### **Preliminary**

#### **1. Short title and commencement**

- (1) This Ordinance may be cited as the Personal Data (Privacy) (Amendment) Ordinance 2011.
- (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Constitutional and Mainland Affairs by notice published in the Gazette.

#### **2. Enactments amended**

- (1) The enactments specified in Parts 2 and 3 are amended as set out in those Parts.
  - (2) The provisions of the Personal Data (Privacy) Ordinance (Cap. 486) set out in an item in column 1 of the Schedule are amended by repealing the words set out in column 2 of that item and substituting the words set out in column 3 of that item.
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## Part 2

### Amendments to Personal Data (Privacy) Ordinance (Cap. 486)

#### Division 1

#### Amendments Relating to Provisions on Preliminary Matters

##### 3. Section 2 amended (Interpretation)

- (1) Section 2(1), English text, definition of *matching procedure*—

**Repeal**

“are compared”

**Substitute**

“is compared”.

- (2) Section 2(1), definition of *relevant person*—

**Repeal paragraph (c)**

**Substitute**

“(c) where the individual is mentally incapacitated within the meaning of section 2 of the Mental Health Ordinance (Cap. 136)—

- (i) a person appointed under section 44A, 59O or 59Q of that Ordinance to be the guardian of that individual; or
- (ii) if the guardianship of that individual is vested in, or the functions of the appointed guardian are to be performed by, the Director of Social Welfare or any other person under section 44B(2A) or (2B)

Part 2—Division 2

Clause 4

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or 59T(1) or (2) of that Ordinance, the Director of Social Welfare or that other person;”.

(3) Section 2(1)—

**Add in alphabetical order**

“*prescribed information* (訂明資訊) means any information specified in Schedule 3;

*rule of law* (法律規則) means—

- (a) a rule of common law or a rule of equity; or
- (b) customary law;”.

(4) Section 2—

**Repeal subsection (2).**

(5) Section 2(4)—

**Repeal**

“64(10)”

**Substitute**

“64”.

## Division 2

### Amendments Relating to Provisions on Administration

#### 4. Section 8 amended (Functions and powers of Commissioner)

(1) Section 8(1)(f)—

**Repeal**

“computer”

**Substitute**

“information”.

(2) Section 8(1)(g), after “with”—

Part 2—Division 2

Clause 5

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**Add**

“, and provide assistance to,”.

(3) After section 8(2)(e)—

**Add**

“(ea) carry out promotional or educational activities or services; and”.

(4) After section 8(2)—

**Add**

“(2A) The Commissioner may impose reasonable charges for any promotional or educational activities or services carried out, or any promotional or educational publications or materials made available, by the Commissioner in the course of the performance of the Commissioner’s functions under this Ordinance.”.

(5) Section 8(5), after “data users”—

**Add**

“and data subjects”.

**5. Section 11A added**

Part II, after section 11—

**Add**

**“11A. Immunity**

(1) No civil liability is incurred by the person appointed to be the Commissioner under section 5(3) or a prescribed officer in respect of anything done or omitted to be done by the person or officer in good faith in the performance or purported performance of any function, or the exercise or purported exercise of any power, imposed or conferred on the Commissioner or officer under this Ordinance.

- (2) The protection conferred under subsection (1) on any person in respect of anything done or omitted to be done does not in any way affect the civil liability of the Commissioner as a corporation sole for that thing.”.

### **Division 3**

#### **Amendments Relating to Provisions on Codes of Practice**

6. **Section 13 amended (Use of approved codes of practice in proceedings under this Ordinance)**
- (1) Section 13(4), definition of *specified body*, paragraph (b)—  
**Repeal**  
“or”.
- (2) Section 13(4), definition of *specified body*, paragraph (c)—  
**Repeal the full stop**  
**Substitute**  
“; or”.
- (3) Section 13(4), definition of *specified body*, after paragraph (c)—  
**Add**  
“(d) the chairman of the Administrative Appeals Board.”.

## **Division 4**

### **Amendments Relating to Provisions on Data User Returns and Register of Data Users**

**7. Section 14 amended (Data user returns)**

(1) Section 14(9)(c)—

**Repeal**

“(3)”

**Substitute**

“(4)”.

(2) Section 14—

**Repeal subsection (10).**

(3) At the end of section 14—

**Add**

“(11) A data user who, in purported compliance with subsection (4) or (8), knowingly or recklessly in a data user return submitted to, or notice served on, the Commissioner 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.”.

**8. Section 14A added**

After section 14—

**Add**

**“14A. Verification of data user returns**

- (1) For the purpose of verifying the accuracy of information in a data user return submitted under section 14, the Commissioner may, by written notice, require any of the persons specified in subsection (2)—
  - (a) to provide any document, record, information or thing specified in the notice; and
  - (b) to respond in writing to any question specified in the notice.
- (2) The persons are—
  - (a) the data user; and
  - (b) any other person whom the Commissioner has reasonable grounds to believe may be able to assist in verifying any information in the data user return.
- (3) A person on whom a notice is served under subsection (1) may refuse to provide any document, record, information or thing, or any response to any question, specified in the notice, if the person is entitled or obliged under this or any other Ordinance to do so.
- (4) If, having regard to any document, record, information or thing, or any response to any question, provided under subsection (1), the Commissioner considers that any information in a data user return is inaccurate, the Commissioner may, by written notice, require the data user to correct the information in the data user return.
- (5) Subject to subsection (3), a person on whom a notice is served under subsection (1) or (4) must comply with the requirement within the period specified in the notice.

Part 2—Division 4

Clause 9

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- (6) A person who, in purported compliance with a notice under subsection (1), knowingly or recklessly provides any document, record, information or thing, or any response to any question, 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. Section 15 amended (Register of data users)**

- (1) After section 15(4)—

**Add**

- “(4A) A data user who, in purported compliance with subsection (3) or (4), knowingly or recklessly in a notice submitted to or served on the Commissioner 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.”.

- (2) After section 15(6)—

**Add**

- “(7) A person who, in a notice served on the Commissioner under subsection (6), supplies any information which is false or misleading in a material particular for the purpose of having the particulars contained in the register relating to that person in that person’s capacity as a data user deleted from the register, commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months.”.

## **Division 5**

### **Amendments Relating to Provisions on Access to and Correction of Personal Data**

**10. Part V, Division 1 heading and section 17A added**

Part V, before section 18—

**Add**

#### **“Division 1**

#### **Access to Personal Data**

**17A. Interpretation of Part V**

Without limiting the definition of *relevant person* in section 2(1), in this Part—

*relevant person* (有關人士), in relation to an individual, also includes a person authorized in writing by the individual to make, on behalf of the individual—

- (a) a data access request; or
- (b) a data correction request.”.

**11. Section 18 amended (Data access request)**

(1) Section 18(4), English text—

**Repeal**

“those data”

**Substitute**

“the data”.

Part 2—Division 5

Clause 12

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(2) After section 18(4)—

**Add**

- “(5) A person commits an offence if the person, in a data access request, supplies any information which is false or misleading in a material particular for the purposes of having the data user—
- (a) informing the person whether the data user holds any personal data which is the subject of the request; and
  - (b) if applicable, supplying a copy of the data.
- (6) A person who commits an offence under subsection (5) is liable on conviction to a fine at level 3 and to imprisonment for 6 months.”.

**12. Section 19 amended (Compliance with data access request)**

(1) Section 19—

**Repeal subsection (1)**

**Substitute**

- “(1) Subject to subsection (2) and sections 20 and 28(5), a data user must comply with a data access request within 40 days after receiving the request by—
- (a) if the data user holds any personal data which is the subject of the request—
    - (i) informing the requestor in writing that the data user holds the data; and
    - (ii) supplying a copy of the data; or
  - (b) if the data user does not hold any personal data which is the subject of the request, informing the requestor in writing that the data user does not hold the data.

Part 2—Division 5

Clause 13

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(1A) Despite subsection (1)(b), if—

(a) a data access request is made to the Hong Kong Police Force as to whether it holds any record of criminal conviction of an individual; and

(b) it does not hold such record,

it must comply with the request by informing the requestor orally, within 40 days after receiving the request, that it does not hold such record.”.

(2) Section 19(2), after “(1)”—

**Add**

“or (1A)”.

(3) Section 19(3)(b), English text—

**Repeal**

“data have”

**Substitute**

“data has”.

(4) Section 19(3)(c)(iii)(B)(I), English text—

**Repeal**

“data are”

**Substitute**

“data is”.

**13. Section 20 amended (Circumstances in which data user shall or may refuse to comply with data access request)**

(1) Section 20(1)(c), after “under this”—

**Add**

“or any other”.

Part 2—Division 5

Clause 13

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- (2) Section 20(3)(e)—

**Repeal**

“or”.

- (3) After section 20(3)(e)—

**Add**

“(ea) the data user is entitled under this or any other Ordinance not to disclose the personal data which is the subject of the request; or”.

- (4) After section 20(4)—

**Add**

“(5) Despite any provision in any relevant Ordinance or its subsidiary legislation in relation to discovery and inspection, in any proceedings under this Ordinance, a specified body—

(a) may, for the purpose of deciding on the issue as to whether a data user is required or entitled to refuse to comply with a data access request under this section or deciding on any question related to that issue, require the personal data which is the subject of the request to be made available for its inspection; and

(b) must not require the personal data to be disclosed to any party to the proceedings, whether by discovery or otherwise, unless it has decided that the data user must comply with the request.

- (6) In subsection (5)—

*proceedings under this Ordinance* (根據本條例進行的法律程序) has the same meaning given by section 13(4);

*relevant Ordinance* (有關條例) means—

(a) the High Court Ordinance (Cap. 4);

Part 2—Division 5

Clause 14

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(b) the District Court Ordinance (Cap. 336); or

(c) the Administrative Appeals Board Ordinance (Cap. 442);

*specified body* (指明當局) has the same meaning given by section 13(4).”.

**14. Part V, Division 2 heading added**

After section 21—

**Add**

**“Division 2**

**Correction of Personal Data”.**

**15. Section 22 amended (Data correction request)**

(1) Section 22(1)—

**Repeal**

“subsection”

**Substitute**

“subsections (1A) and”.

(2) Section 22(1)(b), English text—

**Repeal**

“data are”

**Substitute**

“data is”.

(3) After section 22(1)—

**Add**

Part 2—Division 5

Clause 16

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“(1A) If a person is a relevant person in relation to an individual only because the person has been authorized in writing by the individual to make a data access request on behalf of the individual, the person is not entitled to make a data correction request.”.

(4) Section 22(3)—

**Repeal**

“data are”

**Substitute**

“data is”.

(5) After section 22(3)—

**Add**

“(4) A person who, in a data correction request, supplies any information which is false or misleading in a material particular for the purpose of having the personal data corrected as indicated in the request, commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months.”.

**16. Part V, Division 3 heading added**

After section 25—

**Add**

**“Division 3**

**Miscellaneous”.**

**17. Section 26 amended (Erasure of personal data no longer required)**

(1) Section 26(1)—

**Repeal**

Part 2—Division 6

Clause 18

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“shall”

**Substitute**

“must take all practicable steps to”.

(2) Section 26(1), English text—

**Repeal**

“data are”

**Substitute**

“data is”.

(3) Section 26(1), English text—

**Repeal**

“data were”

**Substitute**

“data was”.

(4) Section 26(2)(a)—

**Repeal**

“shall”

**Substitute**

“must take all practicable steps to”.

## **Division 6**

### **Amendments Relating to Provisions on Matching Procedures and Transfers of Personal Data, etc.**

**18. Section 31 amended (Matching procedure request)**

After section 31(3)—

**Add**

Part 2—Division 7

Clause 21

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“(4) A data user who, in a matching procedure request made under subsection (1), supplies any information which is false or misleading in a material particular for the purpose of obtaining the Commissioner’s consent to the carrying out of the matching procedure to which the request relates, commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months.”.

**19. Section 32 amended (Determination of matching procedure request)**

After section 32(4)—

**Add**

“(5) A requestor who contravenes any conditions specified in a notice under subsection (1)(b)(i) commits an offence and is liable on conviction to a fine at level 3.”.

**20. Section 34 repealed (Use of personal data in direct marketing)**

Section 34—

**Repeal the section.**

**Division 7**

**Addition of Provisions on Sale and Use of Personal Data**

**21. Part VIA added**

After Part VI—

**Add**

## “Part VIA

### Sale and Use of Personal Data

#### Division 1

#### Interpretation

##### 35A. Interpretation of Part VIA

In this Part—

*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 by mail, facsimile transmission, electronic mail or other means of communication, which are addressed to specific persons by name; 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 advertised; or
- (b) any purpose for which donations or contributions are solicited;

**response facility** (回應設施) means the facility provided by a data user to a data subject under section 35B(3)(b), 35H(3)(b) or 35N(3)(b);

**response period** (回應限期), in relation to an intended sale of personal data, an intended use of personal data in direct marketing for a data user's own purposes, or an intended provision (otherwise than by sale) of personal data to a person for use in direct marketing for that person's own purposes, means the 30-day period beginning on—

- (a) if the data has been collected when written information on the intended sale, use or provision is provided to a data subject under section 35B(3), 35H(3) or 35N(3), the date when the information is provided; or
- (b) if the data has not yet been collected when the information is provided, the date when the data is collected;

**sell** (售賣), in relation to personal data, means to provide the data to a person for gain in money or other property, irrespective of whether—

- (a) the gain is contingent on any condition; or
- (b) the provider retains possession of the data;

**specified class of marketing subjects** (指明類別促銷標的) means a class of marketing subjects specified in the information provided by a data user under section 35B(3)(a)(iii), 35H(3)(a)(ii) or 35N(3)(a)(iii);

**specified class of persons** (指明類別人士) means a class of persons specified in the information provided by a data user under section 35B(3)(a)(ii) or 35N(3)(a)(ii);

*specified kind of personal data* (指明種類個人資料) means a kind of personal data specified in the information provided by a data user under section 35B(3)(a)(i), 35H(3)(a)(i) or 35N(3)(a)(i).

## Division 2

### Sale of Personal Data

#### **35B. Data user to take specified action before selling personal data**

- (1) A data user who intends to sell any personal data of a data subject must take the action specified in subsection (3).
- (2) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.
- (3) The data user must provide the data subject with—
  - (a) written information on—
    - (i) the kinds of personal data to be sold;
    - (ii) the classes of persons to which the data is to be sold; and
    - (iii) if the data is to be sold to those classes of persons for use in direct marketing for their own purposes, the classes of marketing subjects in relation to which the data is to be used; together with
  - (b) a facility through which the data subject may, without charge from the data user, indicate in writing to the data user whether the data subject objects to the intended sale.

## Part 2—Division 7

Clause 21

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- (4) A response facility may provide means that allow a data subject to indicate in writing whether the data subject objects to the intended sale, with reference to—
  - (a) any specified kind of personal data;
  - (b) any specified class of persons; or
  - (c) any specified class of marketing subjects.
- (5) The information and response facility provided under subsection (3) must be presented in a manner that is easily readable and easily understandable.
- (6) A data user who sells any personal data of a data subject without taking the action specified in subsection (3) commits an offence and is liable on conviction to a fine of \$1,000,000 and to imprisonment for 5 years.
- (7) In any proceedings for an offence under subsection (6), 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.

**35C. Sale of personal data against data subject's wish**

- (1) A data user who has taken the action specified in section 35B(3) must not sell any personal data of the data subject unless—
  - (a) the sale falls within the scope of the information provided under that section; and
  - (b) the data subject does not object to the sale.
- (2) For the purposes of subsection (1)—
  - (a) a sale of personal data of a data subject falls within the scope of the information provided under section 35B(3) if—

Part 2—Division 7  
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- (i) the personal data falls within a specified kind of personal data;
  - (ii) the person to whom the data is sold falls within a specified class of persons; and
  - (iii) where the data is sold to that person for use in direct marketing in relation to a marketing subject for that person's own purposes, the marketing subject falls within a specified class of marketing subjects; and
- (b) the data subject is taken not to object to the sale if, within the response period—
  - (i) the data subject has sent a written reply to the data user indicating that the data subject does not object to any personal data of the data subject falling within the specified kind of personal data being sold to the specified class of persons, and if applicable, to the data being used in direct marketing in relation to the specified class of marketing subjects for the purposes of the persons to whom the data is sold; or
  - (ii) the data subject does not send any written reply to the data user indicating that the data subject objects to such sale as referred to in subparagraph (i).
- (3) A data subject may indicate whether the data subject objects to a sale of personal data through the response facility or other means.
- (4) A data user who contravenes subsection (1) commits an offence and is liable on conviction to a fine of \$1,000,000 and to imprisonment for 5 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.

**35D. Data subject may require data user to cease to sell personal data**

- (1) Irrespective of whether a data subject provided with information under section 35B(3) has, within the response period, sent any written reply to the data user indicating no objection to any personal data of the data subject falling within a specified kind of personal data being sold to a specified class of persons, and if applicable, to the data being used in direct marketing in relation to a specified class of marketing subjects for the purposes of the persons to whom the data is sold, the data subject may subsequently object to such sale by sending a written notification to the data user.
- (2) The written notification from the data subject under subsection (1) may require the data user—
- (a) to cease to sell to the specified class of persons any personal data of the data subject falling within the specified kind of personal data, and if applicable, for use in direct marketing in relation to the specified class of marketing subjects; and
  - (b) to notify any person falling within the specified class of persons to whom any personal data of the data subject falling within the specified kind of personal data has been sold to cease to use the data, as the case may be—
    - (i) for any purpose; or
    - (ii) in direct marketing in relation to the specified class of marketing subjects.

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- (3) A data user must, without charge to a data subject, comply with the requirement specified in a notification from the data subject under subsection (1).
- (4) If a notification from a data subject under subsection (1) requires a data user to notify a person of the matter specified in subsection (2)(b), the data user must notify that person of the matter in writing.
- (5) If a data user, under subsection (4), notifies a person in writing to cease to use any personal data of a data subject, the person must cease to use the data in accordance with the notification from the data user.
- (6) A data user who contravenes subsection (3) or (4), or a person who contravenes subsection (5), commits an offence and is liable on conviction to a fine of \$1,000,000 and to imprisonment for 5 years.
- (7) In any proceedings for an offence under subsection (6), 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.
- (8) This section does not affect the operation of section 26.

**35E. Prescribed consent for sale of personal data 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 selling any personal data of the data subject, the data user is taken to have obtained the consent if the data user has not contravened any requirement under section 35B, 35C or 35D.

**35F. Chief Executive in Council may grant exemption**

The Chief Executive in Council may, by notice published in the Gazette, exempt conditionally or unconditionally—

- (a) any class or description of data users; or
  - (b) any kind or description of personal data,
- from all the requirements under this Division.

**Division 3**

**Use of Personal Data in Direct Marketing**

**Subdivision 1**

**Application**

**35G. 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 person to whom the services are intended to be provided; or
  - (ii) any other individual.

## **Subdivision 2**

### **Use of Personal Data in Direct Marketing for Data Users' Own Purposes**

#### **35H. Data user to take specified action before using personal data in direct marketing**

- (1) Subject to section 35I, a data user who intends to use any personal data of a data subject in direct marketing for the data user's own purposes must take the action specified in subsection (3).
- (2) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.
- (3) The data user must provide the data subject with—
  - (a) written information on—
    - (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; together with
  - (b) a facility through which the data subject may, without charge from the data user, indicate in writing to the data user whether the data subject objects to the intended use.
- (4) A response facility may provide means that allow a data subject to indicate in writing whether the data subject objects to the intended use, with reference to—
  - (a) any specified kind of personal data; or
  - (b) any specified class of marketing subjects.
- (5) The information and response facility provided under subsection (3) must be presented in a manner that is easily readable and easily understandable.

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- (6) Subject to section 35I, a data user who uses any personal data of a data subject in direct marketing for the data user's own purposes without taking the action specified in subsection (3) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (7) In any proceedings for an offence under subsection (6), 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.
- (8) In any proceedings for an offence under subsection (6) on the use of any personal data in direct marketing in relation to a marketing subject, the burden of proving that this section does not apply in relation to that use because of section 35I lies on the data user.

**35I. Circumstances under which section 35H does not apply**

- (1) Section 35H does not apply in relation to the continued use by a data user of any personal data in direct marketing in relation to a marketing subject for the data user's own purposes if—
  - (a) before the commencement date, the data user had so used the personal data; and
  - (b) such use did not contravene any provision of this Ordinance as in force immediately before the commencement date.
- (2) Section 35H does not apply in relation to the intended use or use by a data user of any personal data in direct marketing in relation to a marketing subject for the data user's own purposes if—
  - (a) the data is sold or provided to the data user by another person for such intended use or use; and

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- (b) the data user has been notified in writing by that person—
  - (i) that the action specified in section 35B(3) or 35N(3) has been taken by that person in relation to the sale or provision of data; and
  - (ii) that each of the conditions specified in section 35C(1) or 35O(1) in relation to the sale or provision of the data has been satisfied.

(3) In this section—

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

**35J. Use of personal data in direct marketing against data subject's wish**

- (1) A data user who has taken the action specified in section 35H(3) must not use, for the data user's own purposes, any personal data of the data subject in direct marketing unless—
  - (a) the use falls within the scope of the information provided under that section; and
  - (b) the data subject does not object to the use.
- (2) For the purposes of subsection (1)—
  - (a) a use of personal data of a data subject falls within the scope of the information provided under section 35H(3) if—
    - (i) the personal data falls within a specified kind of personal data; and
    - (ii) the marketing subject in relation to which the data is used falls within a specified class of marketing subjects; and

- (b) the data subject is taken not to object to the use if, within the response period—
  - (i) the data subject has sent a written reply to the data user indicating that the data subject does not object to any personal data of the data subject falling within the specified kind of personal data being used in direct marketing in relation to the specified class of marketing subjects for the data user's own purposes; or
  - (ii) the data subject does not send any written reply to the data user indicating that the data subject objects to such use as referred to in subparagraph (i).
- (3) A data subject may indicate whether the data subject objects to a use of personal data through the response facility 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.

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

- (1) Irrespective of whether a data subject provided with information under section 35H(3) has, within the response period, sent any written reply to the data user indicating no objection to any personal data of the data subject falling within a specified kind of personal data being used in direct marketing in relation to a

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specified class of marketing subjects for the data user's own purposes, the data subject may subsequently object to such use by sending a written notification to the data user, requiring the data user to cease to so use the data.

- (2) A data user must, without charge to a data subject, comply with the requirement specified in a notification from the data subject under subsection (1).
- (3) A data user who contravenes subsection (2) 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.
- (5) This section does not affect the operation of section 26.

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

- (1) A data user who uses personal data of a data subject in direct marketing for the data user's own purposes must, when the data user so uses the data for the first time, inform the data subject that the data user is required, without charge to the data subject, to cease to so use the data if the data subject so requires in writing.
- (2) If a data subject, by written notification, requires a data user to cease to use any personal data of the data subject in direct marketing, the data user must cease to so use the data without charge to the data subject.

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- (3) A data user who contravenes subsection (1) or (2) 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.

**35M. Prescribed consent for use of 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 for the data user's own purposes, the data user is taken to have obtained the consent if the data user has not contravened any requirement under section 35H, 35J or 35K.

**Subdivision 3**

**Provision (Otherwise than by Sale) of Personal Data to Person for Use in Direct Marketing**

**35N. Data user to take specified action before providing (otherwise than by sale) personal data to person for use in direct marketing**

- (1) A data user who intends to provide, otherwise than by sale, any personal data of a data subject to a person for use in direct marketing for that person's own purposes must take the action specified in subsection (3).

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- (2) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.
- (3) The data user must provide the data subject with—
  - (a) written information on—
    - (i) the kinds of personal data to be provided;
    - (ii) the classes of persons to which the data is to be provided; and
    - (iii) the classes of marketing subjects in relation to which the data is to be used; together with
  - (b) a facility through which the data subject may, without charge from the data user, indicate in writing to the data user whether the data subject objects to the intended provision.
- (4) A response facility may provide means that allow a data subject to indicate in writing whether the data subject objects to the intended provision, with reference to—
  - (a) any specified kind of personal data;
  - (b) any specified class of persons; or
  - (c) any specified class of marketing subjects.
- (5) The information and response facility provided under subsection (3) must be presented in a manner that is easily readable and easily understandable.
- (6) A data user who provides, otherwise than by sale, any personal data of a data subject to a person for use in direct marketing for that person's own purposes without taking the action specified in subsection (3) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.

- (7) In any proceedings for an offence under subsection (6), 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.

**350. Provision (otherwise than by sale) of personal data to person for use in direct marketing against data subject's wish**

- (1) A data user who has taken the action specified in section 35N(3) must not provide, otherwise than by sale, any personal data of the data subject to a person for use in direct marketing for that person's own purposes unless—
- (a) the provision falls within the scope of the information provided under that section; and
  - (b) the data subject does not object to the provision.
- (2) For the purposes of subsection (1)—
- (a) a provision of personal data of a data subject falls within the scope of the information provided under section 35N(3) if—
    - (i) the personal data falls within a specified kind of personal data;
    - (ii) the person to whom the data is provided falls within a specified class of persons; and
    - (iii) the marketing subject in relation to which the data is to be used falls within a specified class of marketing subjects; and
  - (b) the data subject is taken not to object to the provision if, within the response period—
    - (i) the data subject has sent a written reply to the data user indicating that the data subject does not object to any personal data of the

data subject falling within the specified kind of personal data being provided to the specified class of persons for use in direct marketing in relation to the specified class of marketing subjects for the purposes of the persons provided with the data; or

- (ii) the data subject does not send any written reply to the data user indicating that the data subject objects to such provision as referred to in subparagraph (i).
- (3) A data subject may indicate whether the data subject objects to a provision of personal data through the response facility 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.

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

- (1) Irrespective of whether a data subject provided with information by a data user under section 35N(3) has, within the response period, sent any written reply to the data user indicating no objection to any personal data of the data subject falling within a specified kind of personal data being provided to a specified class of persons for use in direct marketing in relation to a specified class of marketing subjects for the purposes of the persons provided with the data, the data subject

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- may subsequently object to such provision by sending a written notification to the data user.
- (2) The written notification from the data subject under subsection (1) may require the data user—
    - (a) to cease to provide to the specified class of persons any personal data of the data subject falling within the specified kind of personal data for use in direct marketing in relation to the specified class of marketing subjects; and
    - (b) to notify any person falling within the specified class of persons to whom any personal data of the data subject falling within the specified kind of personal data has been provided to cease to so use the data.
  - (3) A data user must, without charge to a data subject, comply with the requirement specified in a notification from the data subject under subsection (1).
  - (4) If a notification from a data subject under subsection (1) requires a data user to notify a person of the matter specified in subsection (2)(b), the data user must notify person of the matter in writing.
  - (5) If a data user, under subsection (4), notifies a person in writing to cease to use any personal data of a data subject, the person must cease to use the data in accordance with the notification from the data user.
  - (6) A data user who contravenes subsection (3) or (4), or 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.
  - (7) In any proceedings for an offence under subsection (6), 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.

- (8) This section does not affect the operation of section 26.

**35Q. Prescribed consent for provision of personal data to person 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, otherwise than by sale, any personal data of the data subject to a person for use in direct marketing for that person's own purposes, the data user is taken to have obtained the consent if the data user has not contravened any requirement under section 35N, 35O or 35P.

## **Division 4**

### **Disclosure of Personal Data Obtained without Consent**

**35R. Disclosure of 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

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- (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.”.

## **Division 8**

### **Amendments to Provisions on Inspections, Complaints and Investigations**

- 22. Section 39 amended (Restrictions on investigations initiated by complaints)**
- (1) Section 39(1)—

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**Repeal**

“continue”

**Substitute**

“decide to terminate”.

(2) Section 39(1)(a)—

**Repeal**

“continue”

**Substitute**

“not to terminate”.

(3) Section 39(2)—

**Repeal**

“continue”.

**Substitute**

“decide to terminate”.

(4) Section 39(2)(c)—

**Repeal**

“faith; or”.

**Substitute**

“faith;”.

(5) After section 39(2)(c)—

**Add**

“(ca) the primary subject matter of the complaint, as shown by the act or practice specified in it, is not related to privacy of individuals in relation to personal data; or”.

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(6) Section 39(3)—

**Repeal**

“or continue”.

(7) After section 39(3)—

**Add**

“(3A) If the Commissioner decides to terminate an investigation initiated by a complaint before its completion, the Commissioner must, as soon as practicable by notice in writing served on the complainant accompanied by a copy of subsection (4), inform the complainant—

(a) of the decision; and

(b) of the reasons for the decision.”.

(8) Section 39(4)(a)—

**Repeal**

“specified in a notice under subsection (3)”

**Substitute**

“or termination specified in a notice under subsection (3) or (3A)”.

(9) Section 39(4)(b), Chinese text, after “拒絕”—

**Add**

“或終止而提出”.

**23. Section 44 amended (Evidence)**

(1) Section 44(2)(d)(i), English text—

**Repeal**

“those data were”

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**Substitute**

“that data was”.

- (2) After section 44(9)—

**Add**

“(10) A person who contravenes subsection (3) commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months.”.

**24. Section 46 amended (Commissioner, etc. to maintain secrecy)**

- (1) Section 46(1)—

**Repeal**

“and (3)”

**Substitute**

“, (3) and (7)”.

- (2) Section 46(2)—

**Renumber paragraphs (a), (b) and (c) as paragraphs (b), (c) and (d) respectively.**

- (3) Before section 46(2)(b)—

**Add**

“(a) disclosing any matter if the disclosure is necessary for the proper performance of the Commissioner’s functions or the proper exercise of the Commissioner’s powers under this Ordinance;”.

- (4) Section 46(3), English text—

**Repeal**

“are exempt”

**Substitute**

“is exempt”.

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- (5) Section 46(4)—

**Repeal**

“The Commissioner shall not publish a report under this Ordinance after completing an inspection or investigation”

**Substitute**

“If a report is made by the Commissioner on an inspection or investigation, and the report contains personal data, the Commissioner must not publish the report”.

- (6) Section 46(4)(b)(i), English text—

**Repeal**

“are exempt”

**Substitute**

“is exempt”.

- (7) After section 46(6)—

**Add**

“(7) The Commissioner may disclose matters to an authority of a place outside Hong Kong if—

- (a) that authority has undertaken to be bound by the secrecy requirements imposed by the Commissioner;
- (b) any of the conditions specified in subsection (9) is satisfied; and
- (c) in the opinion of the Commissioner, the disclosure will enable or assist the authority to perform a relevant function of the authority.

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(8) In subsection (7)—

***relevant function*** (有關職能), in relation to an authority of a place outside Hong Kong, means any function which in the opinion of the Commissioner is similar (whether in whole or in part) to any of the Commissioner's functions under this Ordinance.

(9) The conditions are—

- (a) 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;
- (b) the data subject to whom the matter relates has consented in writing to the disclosure;
- (c) the Commissioner has reasonable grounds for believing that, in all the circumstances of the case—
  - (i) the disclosure is for the avoidance or mitigation of adverse action against the data subject;
  - (ii) it is not practicable to obtain the consent in writing of the data subject to that disclosure; and
  - (iii) if it was practicable to obtain such consent, the data subject would give it;
- (d) the personal data to which the matters relate is exempt from the provisions of data protection principle 3 because of an exemption under Part VIII; or

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(e) the Commissioner has taken all reasonable precautions and exercised all due diligence to ensure that the personal data to which the matters relate will not, in that place, be collected, held, processed or used in any manner which, if that place were Hong Kong, would be a contravention of a requirement under this Ordinance.

(10) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months.”.

**25. Section 47 amended (Persons to be informed of result of inspection or investigation)**

(1) Section 47(2)(d)—

**Repeal**

“proposes”

**Substitute**

“has decided”.

(2) After section 47(2)—

**Add**

“(2A) If the Commissioner decides to serve an enforcement notice on a data user in consequence of an investigation, the Commissioner may serve the notice at the same time when informing the data user of the information relating to the investigation under subsection (2).”.

(3) Section 47(3)(e)—

**Repeal**

“proposes”

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**Substitute**

“has decided”.

- (4) Section 47(3)(f)—

**Repeal**

“does not propose”

**Substitute**

“has decided not”.

- (5) After section 47(3)—

**Add**

“(3A) Subsection (3) does not apply if the complainant has withdrawn the complaint.”.

- (6) Section 47(4)(a)—

**Repeal**

“does not propose”

**Substitute**

“has decided not”.

**26. Section 48 amended (Reports by Commissioner)**

Section 48(3), English text—

**Repeal**

“as to the”

**Substitute**

“as to”.

**27. Section 50 amended (Enforcement notices)**

- (1) Section 50—

**Repeal subsection (1)****Substitute**

- “(1) If, following the completion of an investigation, the Commissioner is of the opinion that the relevant data user is contravening or has contravened a requirement under this Ordinance, the Commissioner may serve on the data user a notice in writing, directing the data user to remedy the contravention.
- (1A) An enforcement notice under subsection (1) must—
- (a) state that the Commissioner is of the opinion referred to in subsection (1);
  - (b) specify—
    - (i) the requirement which, in the opinion of the Commissioner, is being or has been contravened;
    - (ii) the act or omission that constitutes the contravention; and
    - (iii) the reason for that opinion;
  - (c) specify the steps that the data user must take (including ceasing any act or practice) to remedy the contravention;
  - (d) specify the date on or before which the steps must be taken; and
  - (e) be accompanied by a copy of this section.
- (1B) The date specified in subsection (1A)(d) must be a date which is not earlier than the expiry of the period specified in subsection (7) within which an appeal against the notice may be made.”.
- (2) Section 50(2)—

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**Repeal**

“or matter to which”

**Substitute**

“to which”.

(3) Section 50(2)—

**Repeal**

“or matter, as the case may be,”.

(4) Section 50(3)—

**Repeal**

“or matter to which”

**Substitute**

“to which”.

(5) Section 50(3)(b)—

**Repeal**

“or matter, as the case may be”.

**28. Sections 50A and 50B added**

Part VII, after section 50—

**Add**

**“50A. Offences relating to enforcement notices**

(1) A data user who contravenes an enforcement notice commits an offence and is liable—

(a) on a first conviction—

(i) to a fine at level 5 and to imprisonment for 2 years; and

(ii) if the offence continues after the conviction, to a daily penalty of \$1,000; and

- (b) on a second or subsequent conviction—
  - (i) to a fine at level 6 and to imprisonment for 2 years; and
  - (ii) if the offence continues after the conviction, to a daily penalty of \$2,000.
- (2) In any proceedings for an offence under subsection (1), it is a defence for the data user charged to show that the data user exercised all due diligence to comply with the enforcement notice.
- (3) A data user who, having complied with an enforcement notice, intentionally does the same act or makes the same omission in contravention of the requirement under this Ordinance, as specified in the enforcement notice under section 50(1A)(b), commits an offence and is liable on conviction—
  - (a) to a fine at level 5 and to imprisonment for 2 years; and
  - (b) if the offence continues after the conviction, to a daily penalty of \$1,000.

**50B. Offences relating to failure to comply with requirements of Commissioner etc.**

- (1) A person commits an offence if the person—
  - (a) without lawful excuse, obstructs, hinders or resists the Commissioner or any other person in performing the functions or exercising the powers of the Commissioner or that other person under this Part;
  - (b) without lawful excuse, fails to comply with any lawful requirement of the Commissioner or any other person under this Part; or

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- (c) in the course of the performance or exercise by the Commissioner or any other person of functions or powers under this Part—
  - (i) makes to the Commissioner or that other person a statement which the person knows to be false or does not believe to be true; or
  - (ii) otherwise knowingly misleads the Commissioner or that other person.
- (2) A person who commits an offence under subsection (1) is liable on conviction to a fine at level 3 and to imprisonment for 6 months.”.

## Division 9

### Amendments to Provisions on Exemptions

**29. Section 51A added**

After section 51—

**Add**

**“51A. Performance of judicial functions**

- (1) Personal data held by a court, a magistrate or a judicial officer in the course of performing judicial functions is exempt from the provisions of the data protection principles and Parts IV and V and sections 36 and 38(b).
- (2) In this section—  
*judicial officer* (司法人員) has the same meaning given by section 2 of the Judicial Officers Recommendation Commission Ordinance (Cap. 92).”.

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Clause 30

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**30. Section 58 amended (Crime, etc.)**

(1) Section 58(1), English text—

**Repeal**

“are exempt”

**Substitute**

“is exempt”.

(2) Section 58(2), English text—

**Repeal**

“are exempt”

**Substitute**

“is exempt”.

(3) Section 58(2)(a), English text—

**Repeal**

“data are”

**Substitute**

“data is”.

(4) After section 58(5)—

**Add**

“(6) In this section—

*crime* (罪行) means—

(a) an offence under the laws of Hong Kong; or

(b) if personal data is held or used in connection with legal or law enforcement cooperation between Hong Kong and a place outside Hong Kong, an offence under the laws of that place;

*offender* (犯罪者) means a person who commits a crime.”.

Part 2—Division 9

Clause 31

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**31. Section 59 amended (Health)**

(1) Section 59—

**Renumber the section as section 59(1).**

(2) Section 59(1), English text—

**Repeal**

“are exempt”

**Substitute**

“is exempt”.

(3) After section 59(1)—

**Add**

“(2) Personal data relating to the identity or location of a data subject is exempt from the provisions of data protection principle 3 if the application of those provisions to the data would be likely to cause serious harm to the physical or mental health of—

(a) the data subject; or

(b) any other individual.”.

**32. Section 59A added**

After section 59—

**Add**

**“59A. Care and guardianship of minors**

(1) Personal data in relation to a minor transferred or disclosed by the Hong Kong Police Force or Customs and Excise Department to a relevant person of a minor is exempt from the provisions of data protection principle 3 if—

Part 2—Division 9

Clause 33

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- (a) the purpose of the transfer or disclosure is to facilitate the relevant person to exercise proper care and guardianship of the minor;
  - (b) the transfer or disclosure is in the interest of the minor; and
  - (c) the application of those provisions in relation to such transfer or disclosure would be likely to prejudice the exercise of proper care and guardianship of the minor by the relevant person or the interest of the minor.
- (2) In any proceedings against a person for a contravention of any of the provisions of data protection principle 3 it is a defence for the person to show that the person had reasonable grounds for believing that failure to so transfer or disclose the data would have been likely to prejudice any of the matters referred to in subsection (1)(c).”.

**33. Sections 60A and 60B added**

After section 60—

**Add**

**“60A. Self incrimination**

- (1) If, as a result of complying with a provision of data protection principle 6 or section 18(1)(b) in relation to any personal data, a data user might be incriminated in any proceedings for any offence other than an offence under this Ordinance, the data is exempt from that provision or section.

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Clause 34

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- (2) Information disclosed by a data user in compliance with a provision of data protection principle 6 or section 18(1)(b) is not admissible against the data user in any proceedings for an offence under this Ordinance.

**60B. Legal proceedings etc.**

Personal data is exempt from the provisions of data protection principle 3 if the use of the data is—

- (a) required or authorized by or under any enactment or by an order of a court in Hong Kong;
- (b) required in connection with any legal proceedings in Hong Kong; or
- (c) required for establishing, exercising or defending legal rights in Hong Kong.”.

**34. Sections 63B, 63C and 63D added**

Part VIII, after section 63A—

**Add**

**“63B. Due diligence exercise**

- (1) Personal data transferred or disclosed by a data user for the purpose of a due diligence exercise to be conducted in connection with a proposed business transaction that involves—
- (a) a transfer of the business or property of, or any shares in, the data user;
  - (b) a change in the shareholdings of the data user; or
  - (c) an amalgamation of the data user with another body,

Part 2—Division 9  
Clause 34

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is exempt from the provisions of data protection principle 3 if each of the conditions specified in subsection (2) is satisfied.

- (2) The conditions are—
  - (a) the personal data transferred or disclosed is not more than necessary for the purpose of the due diligence exercise;
  - (b) goods, facilities or services which are the same as or similar to those provided by the data user to the data subject are to be provided to the data subject, on completion of the proposed business transaction, by a party to the transaction or a new body formed as a result of the transaction;
  - (c) it is not practicable to obtain the prescribed consent of the data subject for the transfer or disclosure.
- (3) Subsection (1) does not apply if the primary purpose of the proposed business transaction is the sale, transfer or disclosure of the personal data.
- (4) If a data user transfers or discloses personal data to a person for the purpose of a due diligence exercise to be conducted in connection with a proposed business transaction described in subsection (1), the person—
  - (a) must only use the data for that purpose; and
  - (b) must, as soon as practicable after the completion of the due diligence exercise—
    - (i) return the personal data to the data user; and
    - (ii) destroy any record of the personal data that is kept by the person.
- (5) A person who contravenes subsection (4) commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 2 years.

(6) In this section—

*due diligence exercise* (盡職審查), in relation to a proposed business transaction, means the examination of the subject matter of the transaction to enable a party to decide whether to proceed with the transaction;

*sell* (售賣), in relation to personal data, has the same meaning given by section 35A.

### **63C. Emergency situations**

(1) Personal data is exempt from the provisions of data protection principle 1(3) and data protection principle 3 if the application of those provisions to the data would be likely to prejudice any of the following matters—

- (a) identifying an individual who is reasonably suspected to be, or is, involved in a life-threatening situation;
- (b) informing the individual's immediate family members or relevant persons of the individual's involvement in the life-threatening situation;
- (c) the carrying out of emergency rescue operations or provision of emergency relief services.

(2) In any proceedings against a person for a contravention of any of the provisions of data protection principle 1(3) or data protection principle 3, it is a defence for the person to show that the person had reasonable grounds for believing that the application of that provision to the personal data would have been likely to prejudice any of the matters specified in subsection (1)(a), (b) or (c).

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Clause 35

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(3) In this section—

*immediate family member* (家人), in relation to a person, means another person who is related to the person by blood, marriage, adoption or affinity.

**63D. Transfer of records to Government Records Service**

(1) Personal data contained in records of historical, research, educational or cultural interest that are transferred to the Government Records Service for archive purposes is exempt from the provisions of data protection principle 3.

(2) In this section—

*archive* (檔案保存), in relation to a record—

- (a) includes appraising the record to decide whether it is to be retained; but
- (b) does not include accessing the record from the repository in which it is retained for purposes unrelated to the management or preservation of the record.”.

**Division 10**

**Amendments Relating to Provisions on Offences and Compensation**

**35. Section 64 substituted**

Section 64—

**Repeal the section**

**Substitute**

Part 2—Division 10

Clause 36

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**“64. Offence for contravention of requirements under Ordinance**

- (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(6), 15(4A) or (7), 18(5), 22(4), 31(4), 32(5), 35B(6), 35C(4), 35D(6), 35H(6), 35J(4), 35K(3), 35L(3), 35N(6), 35O(4), 35P(6), 35R(1) or (2), 44(10), 46(10), 50A(1) or (3), 50B(1) or 63B(4); or
  - (c) a contravention of any requirement under section 35B(1), 35H(1) or 35N(1).”.

**36. Section 64A added**

After section 64—

**Add**

**“64A. Time limit for laying of information etc.**

- (1) Despite section 26 of the Magistrates Ordinance (Cap. 227), a complaint or information in respect of an offence under this Ordinance may be made to or laid before a magistrate within 2 years from the date of commission of the offence.
- (2) Subsection (1) does not apply in relation to the making of any complaint or laying of any information in respect of an offence under this Ordinance which was committed before the commencement date of section 36 of the Personal Data (Privacy) (Amendment) Ordinance 2011 ( of 2011).”.

Part 2—Division 10

Clause 37

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**37. Section 66 amended (Compensation)**

(1) Section 66(3)(b) and (4), English text—

**Repeal**

“were inaccurate”

**Substitute**

“was inaccurate”.

(2) After section 66(4)—

**Add**

“(5) Proceedings brought by an individual in reliance on subsection (1) are to be brought in the District Court but all such remedies are obtainable in those proceedings as would be obtainable in the Court of First Instance.”.

**38. Sections 66A and 66B added**

Part IX, after section 66—

**Add**

**“66A. Help for aggrieved persons in obtaining information, etc.**

(1) With a view to helping a person (*the person aggrieved*) to decide whether to institute proceedings under section 66 and, if the person does so, to formulate and present his or her case in the most effective manner, the Commissioner may prescribe—

(a) forms by which the person aggrieved may question the respondent on the respondent’s reasons for doing any relevant act, or on any other matter which is or may be relevant; and

(b) forms by which the respondent may, if he or she so wishes, reply to any questions.

## Part 2—Division 10

Clause 38

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- (2) If the person aggrieved questions the respondent (whether or not in accordance with a form referred to in subsection (1))—
  - (a) the question and any reply by the respondent (whether or not in accordance with such a form) are, subject to subsections (3), (4) and (5), admissible as evidence in the proceedings; and
  - (b) if it appears to the District Court that the respondent, deliberately and without reasonable excuse, omitted to reply within a reasonable period or that the respondent's reply is evasive or equivocal, the Court may draw any inference from that fact it considers just and equitable to draw.
- (3) The Commissioner may—
  - (a) prescribe the period within which questions must be served in order to be admissible under subsection (2)(a); and
  - (b) prescribe the manner in which a question and any reply by the respondent may be served.
- (4) Rules under the District Court Ordinance (Cap. 336) may empower the District Court entertaining a claim under section 66 to determine, before the date fixed for the hearing of the claim, whether a question or reply is admissible under this section or not.
- (5) This section is without prejudice to any other enactment or rule of law regulating interlocutory and preliminary matters in proceedings before the District Court, and has effect subject to any enactment or rule of law regulating the admissibility of evidence in such proceedings.
- (6) In this section—

*respondent* (答辯人) includes a prospective respondent.

**66B. Commissioner may grant assistance in respect of proceedings**

- (1) A person who may institute proceedings to seek compensation under section 66 may make an application to the Commissioner for assistance in respect of those proceedings.
- (2) The Commissioner must consider an application under subsection (1) and may grant it if the Commissioner thinks fit to do so, in particular if—
  - (a) the case raises a question of principle; or
  - (b) it is unreasonable, having regard to the complexity of the case or the applicant's position in relation to the respondent or another person involved or any other matter, to expect the applicant to deal with the case unaided.
- (3) Assistance by the Commissioner under this section may include—
  - (a) giving advice;
  - (b) arranging for the giving of advice or assistance by a solicitor or counsel;
  - (c) arranging for representation by any person, including all such assistance as is usually given by a solicitor or counsel in the steps preliminary or incidental to any proceedings, or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings; and
  - (d) any other form of assistance which the Commissioner may consider appropriate.
- (4) Subsection (3)(c) does not affect the law and practice regulating the descriptions of persons who may appear in, conduct, defend and address a court in, any proceedings except to the extent permitted under rules made in accordance with section 73F of the District Court Ordinance (Cap. 336).

## Part 2—Division 11

Clause 39

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- (5) If expenses are incurred by the Commissioner in providing the applicant with assistance under this section, the recovery of those expenses (as taxed or assessed in such manner as may be prescribed by relevant rules) constitutes a first charge for the benefit of the Commissioner—
- (a) on any costs or expenses which are payable to the applicant by any other person (whether by virtue of a judgment or order of the District Court or an agreement or otherwise) in respect of the matter in connection with which the assistance is given; and
  - (b) on the applicant's rights (so far as those rights relate to any costs or expenses) under any compromise or settlement arrived at in connection with that matter to avoid or bring to an end any proceedings.
- (6) The charge created by subsection (5) is subject to any charge under the Legal Aid Ordinance (Cap. 91) and to any provision in that Ordinance for payment of any sum into the Supplementary Legal Aid Fund established under that Ordinance.
- (7) In this section—
- relevant rules* (《法院規則》) means any rules made under the District Court Ordinance (Cap. 336);
- respondent* (答辯人) includes a prospective respondent.”.

## Division 11

### Amendments Relating to Provisions in Schedules

#### 39. Schedule 1 amended (Data protection principles)

- (1) Schedule 1, English text, section 1(1)(a) and (c)—

Part 2—Division 11

Clause 39

---

**Repeal**

“data are”

**Substitute**

“data is”.

- (2) Schedule 1, English text, section 1(3)—

**Repeal**

“are or are to be collected”

**Substitute**

“is or is to be collected”.

- (3) Schedule 1, English text, section 1(3)(b)(i)(A)—

**Repeal**

“data are”

**Substitute**

“data is”.

- (4) Schedule 1, English text, section 1(3)(b)(ii)—

**Repeal**

“they were”

**Substitute**

“it was”.

- (5) Schedule 1, section 1(3)(b)(ii)—

**Repeal sub-subparagraph (B)**

**Substitute**

“(B) the name or job title, and address, of the individual who is to handle any such request made to the data user,”.

Part 2—Division 11

Clause 39

---

- (6) Schedule 1, English text, section 1(3)—  
**Repeal**  
“data were”  
**Substitute**  
“data was”.
- (7) Schedule 1, English text, section 1(3)—  
**Repeal**  
“are exempt”  
**Substitute**  
“is exempt”.
- (8) Schedule 1, English text, section 2(1)(a)—  
**Repeal**  
“are accurate”  
**Substitute**  
“is accurate”.
- (9) Schedule 1, English text, section 2(1)(a)—  
**Repeal**  
“data are or are”  
**Substitute**  
“data is or is”.
- (10) Schedule 1, English text, section 2(1)(b)—  
**Repeal**  
“are inaccurate”  
**Substitute**  
“is inaccurate”.

Part 2—Division 11

Clause 39

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- (11) Schedule 1, English text, section 2(1)(b)—  
**Repeal**  
“the data are or are”  
**Substitute**  
“the data is or is”.
- (12) Schedule 1, English text, section 2(1)(b)(i) and (ii)—  
**Repeal**  
“the data are”  
**Substitute**  
“the data is”.
- (13) Schedule 1, English text, section 2(1)(c)(i)—  
**Repeal**  
“are materially inaccurate”  
**Substitute**  
“is materially inaccurate”.
- (14) Schedule 1, English text, section 2(1)(c)(i)—  
**Repeal**  
“the data are or are”  
**Substitute**  
“the data is or is”.
- (15) Schedule 1, English text, section 2(1)(c)(ii)—  
**Repeal**  
“that data were”  
**Substitute**  
“that data was”.

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Clause 39

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(16) Schedule 1, English text, section 2(1)(c)(ii)(A)—

**Repeal**

“are inaccurate”

**Substitute**

“is inaccurate”.

(17) Schedule 1, section 2(2)—

**Repeal**

“Personal data shall not be”

**Substitute**

“All practicable steps must be taken to ensure that personal data is not”.

(18) Schedule 1, English text, section 2(2)—

**Repeal**

“the data are or are”

**Substitute**

“the data is or is”.

(19) Schedule 1, after section 2(2)—

**Add**

“(3) Without limiting subsection (2), if a data user engages a data processor, whether within or outside Hong Kong, to process personal data on the data user’s behalf, the data user must adopt contractual or other means to prevent any personal data transferred to the data processor from being kept longer than is necessary for processing of the data.

(4) In subsection (3)—

*data processor* (資料處理者) means a person who—

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Clause 39

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- (a) processes personal data on behalf of another person; and
  - (b) does not process the data for any of the person's own purposes.”.
- (20) Schedule 1—  
**Re-number section 3 as section 3(1).**
- (21) Schedule 1, section 3(1)—  
**Repeal**  
everything after “used for”  
**Substitute**  
“a new purpose.”.
- (22) Schedule 1, after section 3(1)—  
**Add**  
“(2) A relevant person in relation to a data subject may, on his or her behalf, give the prescribed consent required for using his or her personal data for a new purpose if—
  - (a) the data subject is—
    - (i) a minor;
    - (ii) incapable of managing his or her own affairs; or
    - (iii) mentally incapacitated within the meaning of section 2 of the Mental Health Ordinance (Cap. 136);
  - (b) the data subject is incapable of understanding the new purpose and deciding whether to give the prescribed consent; and

Part 2—Division 11

Clause 39

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- (c) the relevant person has reasonable grounds for believing that the use of the data for the new purpose is clearly in the interest of the data subject.
- (3) A data user must not use the personal data of a data subject for a new purpose even if the prescribed consent for so using that data has been given under subsection (2) by a relevant person, unless the data user has reasonable grounds for believing that the use of that data for the new purpose is clearly in the interest of the data subject.
- (4) In this section—
- new purpose* (新目的), in relation to the use of personal data, means any purpose other than—
- (a) the purpose for which the data was to be used at the time of the collection of the data; or
- (b) a purpose directly related to the purpose referred to in paragraph (a).”.
- (23) Schedule 1—
- ReNUMBER section 4 as section 4(1).**
- (24) Schedule 1, section 4(1)—
- Repeal**
- “or other”
- Substitute**
- “, loss or”.
- (25) Schedule 1, English text, section 4(1)(b) and (c)—
- Repeal**
- “data are”

Part 2—Division 11

Clause 40

---

**Substitute**

“data is”.

- (26) Schedule 1, after section 4(1)—

**Add**

“(2) Without limiting subsection (1), if a data user engages a data processor, whether within or outside Hong Kong, to process personal data on the data user’s behalf, the data user must adopt contractual or other means to prevent unauthorized or accidental access, processing, erasure, loss or use of the data transferred to the data processor for processing.

- (3) In subsection (2)—

*data processor* (資料處理者) has the same meaning given by subsection (4) of data protection principle 2.”.

- (27) Schedule 1, English text, section 5(c)—

**Repeal**

“are or are to be”

**Substitute**

“is or is to be”.

**40. Schedule 3 amended (Prescribed information)**

- (1) Schedule 3—

**Repeal**

“[s. 14(10)]”

**Substitute**

“[s. 2]”.

- (2) Schedule 3, English text, item 3—

**Repeal**

Part 2—Division 11

Clause 41

---

“are or are to be”

**Substitute**

“is or is to be”.

(3) Schedule 3—

**Repeal item 6**

**Substitute**

“6. The name or job title, and address, of the individual who is to handle data access requests made to the data user.”.

**41. Schedule 5 amended (Prescribed matters)**

Schedule 5, item 4(a)—

**Repeal**

“any”.

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## **Part 3**

### **Related and Consequential Amendments**

#### **Division 1**

#### **Amendment to District Court Ordinance (Cap. 336)**

**42. Section 73F added**

Part IV, after section 73E—

**Add**

**“73F. Rules in relation to jurisdiction under Personal Data (Privacy) Ordinance**

- (1) The Rules Committee may make rules regulating the practice of the Court in the exercise of its jurisdiction under section 66 of the Personal Data (Privacy) Ordinance (Cap. 486) and the forms of proceedings in the Court.
- (2) The power to make rules under subsection (1)—
  - (a) extends to—
    - (i) all matters of procedure or practice; and
    - (ii) matters relating to or concerning the effect or operation in law of any procedure or practice in any case within the cognizance of the Court as to which rules of the High Court have been or might be made for cases within the cognizance of the High Court; and
  - (b) includes the power to make rules—
    - (i) as to proceedings by or against the Government; and

- (ii) as to the persons who may appear in, conduct, defend and address the Court in, any proceedings in the Court.
- (3) Each party to any proceedings in the Court in the exercise of its jurisdiction under section 66 of the Personal Data (Privacy) Ordinance (Cap. 486) bears its own costs unless the Court otherwise orders on the ground that—
  - (a) the proceedings were brought maliciously or frivolously; or
  - (b) there are special circumstances which warrant an award of costs.
- (4) Without limiting subsections (1) and (2), the power to make rules under this section extends to—
  - (a) prescribing the place or places which are to be the venue or venues for proceedings to which this section relates;
  - (b) requiring the judge or judges sitting at such venue or venues to give priority, to such extent as may be specified in the rules, to hearing and disposing of proceedings to which this section relates.
- (5) The Court in the exercise of its jurisdiction under section 66 of the Personal Data (Privacy) Ordinance (Cap. 486)—
  - (a) is not bound by the rules of evidence; and
  - (b) may inform itself on any matter in such manner as it sees fit, with due regard to—
    - (i) the rights of the parties to the proceedings in the Court to a fair hearing;
    - (ii) the need to determine the substantial merits of the case; and

- (iii) the need to achieve a prompt hearing of the matters at issue between the parties.
- (6) Subject to subsection (5), any rules made in accordance with the provisions of this section may be made so as to modify, with respect to proceedings in the Court, any rule of law or practice as to the proof of any matter or as to the reception or admissibility of any matter in evidence.
- (7) No rule made in accordance with the provisions of this section applies to any proceedings by or against the Government except in so far as it expressly purports so to do.
- (8) It is declared that—
  - (a) subject to paragraph (c), this section—
    - (i) does not of itself operate to prevent the making of any rules—
      - (A) under the provisions of any other section of this Ordinance; and
      - (B) which relate, whether in whole or in part, to the jurisdiction conferred on the Court under the Personal Data (Privacy) Ordinance (Cap. 486); and
    - (ii) does not of itself operate to prevent any rules made under the provisions of any other section of this Ordinance from applying to and in relation to such jurisdiction;
  - (b) where there is any conflict or inconsistency between—
    - (i) any rules made under subsection (2)(b); and

Part 3—Division 2

Clause 43

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(ii) any law and practice regulating the description of persons who may appear in, conduct, defend and address the Court, in any proceedings,

then those rules, to the extent of that conflict or inconsistency, as the case may be, prevail over that law and practice;

(c) where there is any conflict or inconsistency between any rules made under the provisions of this section and any rules made under the provisions of another section of this Ordinance, then those first-mentioned rules, to the extent of that conflict or inconsistency, as the case may be, prevail over those second-mentioned rules.

(9) To avoid doubt, it is declared that no rule made in accordance with this section may empower the Court to hear and determine any proceedings involving any claim beyond its jurisdiction.”.

## **Division 2**

### **Amendments to Administrative Appeals Board Ordinance (Cap. 442)**

#### **43. Schedule amended**

(1) The Schedule, item 29, column 3, paragraph (c)—

#### **Repeal**

“or continue”.

(2) The Schedule, item 29, column 3, after paragraph (c)—

#### **Add**

Part 3—Division 2

Clause 43

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“(ca) to terminate under section 39(3A) an investigation initiated by a complaint;”.

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**Schedule**

[s. 2]

**Part 1**

**Minor Amendments to English Text of Personal Data  
(Privacy) Ordinance Relating to “Personal Data”  
in Singular Form**

	Section	Repeal	Substitution
1.	2(12)	those data	the data
2.	12(8)	data which are	data which is
3.	23(1)	relates are	relates is
4.	23(1)(a) and (b)	those data	the data
5.	23(1)(c)(i)	those data have	the data has
6.	23(1)(c)(ii)	those data	the data
7.	23(1)(c)(ii)	data were	data was
8.	23(1)(c)	those data as	the data as
9.	23(3)(a)	data are	data is
10.	24(3)(b) and (c)	relates are	relates is
11.	25(2)(a)	relates are	relates is
12.	25(2)(i)(B)	those data	that data
13.	27(2)(b)	relates were	relates was
14.	28(6)(b)	those data	that data
15.	33(2)(e)	data are	data is
16.	51	are exempt	is exempt
17.	51	those data	that data
18.	52	are exempt	is exempt

	Section	Repeal	Substitution
19.	53	consist	consists
20.	53	are exempt	is exempt
21.	54(1) and (2)	are exempt	is exempt
22.	55(1)	are exempt	is exempt
23.	55(2), definition of <i>relevant process</i> , paragraph (a)	data are	data is
24.	56	consist	consists
25.	56	are exempt	is exempt
26.	57(1)	are exempt	is exempt
27.	57(2)	are exempt	is exempt
28.	57(2)(a)	data are	data is
29.	57(4)	data are or have	data is or has
30.	58A(1)	which are, or are	which is, or is
31.	58A(2)	which are, or are	which is, or is
32.	58A(2)	are exempt	is exempt
33.	60	are exempt	is exempt
34.	60	consist	consists
35.	61(1)	are exempt	is exempt
36.	61(1)(i)	data are	data is
37.	61(2)	are exempt	is exempt
38.	61(2)(b)	they are	it is
39.	62	are exempt	is exempt
40.	62(a) and (b)	data are	data is
41.	63	which are	which is

	Section	Repeal	Substitution
42.	63	data are	data is
434.	63	those data	that data
44.	63A(1)	consist	consists
45.	63A(1)	are exempt	is exempt
46.	63A(1)	their disclosure	its disclosure
47.	63A(2)	which are	which is
48.	63A(2)	data are	data is

## Part 2

### Minor Amendments to Chinese Text of Personal Data (Privacy) Ordinance Relating to “Personal Data” in Singular Form

	Section	Repeal	Substitution
1.	2(1), definition of <i>使用</i>	該等資料	該資料
2.	2(1), definition of <i>個人資料</i> , paragraphs (b) and (c)	該等資料	該資料
3.	2(1), definition of <i>核對程序</i> , paragraph (a)	某些可	可
4.	2(1), definition of <i>核對程序</i> , paragraph (b)	某些資料，而就該等資料	資料，而就該資料
5.	2(1), definition of <i>核對程序</i> , paragraph (b)	將該等資料	將該資料
6.	2(1), definition of <i>資料使用者</i>	該等資料	該資料

	Section	Repeal	Substitution
7.	2(1), definition of 資料當事人	該等資料	該資料
8.	2(12)	該等資料	該資料
9.	2(12)	該等個人資料	該個人資料
10.	18(1)(b)	該等資料	該資料
11.	18(4)	該等資料	該資料
12.	18(4)	某些個人資料	個人資料
13.	19(3)(a), (b) and (c)(i) and (iii)	該等資料	該資料
14.	20(1)(b)	該等資料	該資料
15.	20(3)(c)	某些個人資料	個人資料
16.	20(3)(c)(i)	該等資料	該資料
17.	20(3)(d)	該等資料	該資料
18.	22(1)	該等資料	該資料
19.	22(2)	某些個人資料	個人資料
20.	22(2)(a) and (b)	該等資料	該資料
21.	23(1)(a), (b) and (c)	該等資料	該資料
22.	23(3)	該等資料	該資料
23.	24(3)(e)	該等資料	該資料
24.	25(2)(i)	該等資料	該資料
25.	26(1)	該等資料	該資料
26.	26(2)(a)	該等資料	該資料
27.	27(1)(c)(i)	該等資料	該資料
28.	28(6)(b)	該等資料	該資料
29.	33(2)(e) and (f)	該等資料	該資料
30.	44(2)(d)(i)	該等資料	該資料

	Section	Repeal	Substitution
31.	54(1)	該等資料	該資料
32.	54(2)	該等資料	該資料
33.	57(1)	該等資料	該資料
34.	57(2)	該等資料	該資料
35.	58(1)(i) and (ii)	該等資料	該資料
36.	58(2)	該等資料	該資料
37.	59(1)(i) and (ii)	該等資料	該資料
38.	61(1)(i)	該等資料	該資料
39.	61(2)(a) and (b)	該等資料	該資料
40.	62(a) and (b)	該等資料	該資料
41.	63	該等資料	該資料
42.	63A(1)	該等資料	該資料
43.	63A(2)	該等資料	該資料
44.	Schedule 1, section 1(1)(a)	該等資料	該資料
45.	Schedule 1, section 1(3)	該等資料	該資料
46.	Schedule 1, section 2(1)(a)	該等個人資料	該個人資料
47.	Schedule 1, section 2(1)(b)	該等個人資料	該個人資料
48.	Schedule 1, section 2(1)(b)(i) and (ii)	該等資料	該資料
49.	Schedule 1, section 2(1)(c)	該等資料	該資料
50.	Schedule 1, section 2(2)	該等資料	該資料
51.	Schedule 1, section 4(1)	該等資料	該資料
52.	Schedule 3, item 2	該等資料	該資料
53.	Schedule 3, item 2	某些個人資料	個人資料

Explanatory Memorandum  
Paragraph 1

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**Explanatory Memorandum**

The object of this Bill is to amend the Personal Data (Privacy) Ordinance (Cap. 486) (*Ordinance*) for the purposes set out in the long title.

2. Clause 1 sets out the short title and provides for commencement.

**Sale of personal data**

3. Clause 21 adds new sections 35B to 35F to the Ordinance to regulate the sale of personal data. The new section 35B requires a data user who intends to sell any personal data of a data subject to provide the data subject with written information on the sale, together with a facility (*response facility*) through which the latter may indicate whether he or she objects to the intended sale.
4. The new section 35C provides that a data user must not sell any personal data of a data subject unless the sale falls within the scope set out in the written information provided to the data subject on the sale, and within the period of 30 days (*response period*) from the provision of the information or collection of data, the data subject either has sent to the data user a reply indicating no objection to the sale or does not send any reply indicating objection.
5. Irrespective of whether a data subject has, within the response period, sent a reply to the data user indicating no objection to a sale of personal data, the data subject may, under the new section 35D, subsequently require a data user to cease to sell the data subject's personal data and to notify any person to whom the data has been sold to cease to use the data. The data user must comply with the requirement of the data subject. If the data user has notified a person to cease to use the personal data of the data subject, the person must cease to use the data.

Explanatory Memorandum

Paragraph 6

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6. Contravention of any of the requirements set out in paragraphs 3 to 5 constitutes an offence. The penalty is a fine of \$1,000,000 and imprisonment for 5 years. Under the new section 35F, the Chief Executive in Council may, by notice published in the Gazette, exempt a class of data users or a kind of personal data from the requirements.
7. The new section 35E sets out what constitutes the consent required under data protection principle 3 in cases involving a sale of personal data.

**Use of personal data in direct marketing**

8. Clause 21 also adds new sections 35G to 35Q to the Ordinance to regulate the use of personal data in direct marketing. The new section 35G provides that the new requirements do not apply to social services run, subvented or subsidized by the Social Welfare Department, health care services provided by the Hospital Authority or Department of Health and certain other social or health care services.
9. New sections 35H to 35L regulate the use of personal data in direct marketing for the data user's own purposes. The new section 35H requires a data user who intends to so use any personal data to provide the data subject with written information on the intended use together with a response facility. The new section 35I sets out the circumstances under which the above requirements do not apply.
10. The new section 35J provides that a data user must not use any personal data of a data subject in direct marketing unless the use falls within the scope set out in the written information provided to the data subject on the use, and within the response period, the data subject either has sent to the data user a reply indicating no objection to the use or does not send any reply indicating objection.

Explanatory Memorandum

Paragraph 11

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11. Irrespective of whether a data subject has, within the response period, sent a reply to the data user indicating no objection to a use of personal data in direct marketing for the data user's own purposes, the data subject may, under the new section 35K, subsequently require a data user to cease to use the data subject's personal data. The data user must comply with the requirement of the data subject.
12. The new section 35L further requires a data user, when using any personal data of a data subject in direct marketing for the first time, to inform the data subject that the data user must cease to so use the data if the data subject so requires. On receiving such a requirement from the data subject, the data user must cease to so use the data.
13. Contravention of any of the requirements set out in paragraphs 9 to 12 constitutes an offence. The penalty is a fine of \$500,000 and imprisonment for 3 years.
14. The new section 35M sets out what constitutes the consent required under data protection principle 3 in cases involving a use of personal data in direct marketing for the data user's own purposes.
15. New sections 35N to 35Q regulate the provision (otherwise than by sale) of personal data of a data subject to other persons for use in direct marketing for those persons' own purposes. The new section 35N requires a data user who intends to so provide any personal data of a data subject to provide the data subject with written information on the intended provision together with a response facility. Under the new section 35O, a data user must not so provide the data unless the provision of the data falls within the scope set out in the written information provided to the data subject, and within the response period, the data subject either has sent to the data user a reply indicating no objection to the provision or does not send any reply indicating objection.

Explanatory Memorandum

Paragraph 16

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16. Irrespective of whether a data subject has, within the response period, sent a reply to the data user indicating no objection to the provision of personal data by the data user to other persons for use in direct marketing for those persons' own purposes, the data subject may, under the new section 35P, subsequently require a data user to cease to so provide the data and to notify any person to whom the data has been provided to cease to so use the data. The data user must comply with the requirement of the data subject. If the data user has notified a person to cease to use the personal data of the data subject in direct marketing, the person must cease to so use the data.
17. Contravention of any of the requirements set out in paragraphs 15 and 16 constitutes an offence. The penalty is a fine of \$500,000 and imprisonment for 3 years.
18. The new section 35Q sets out what constitutes the consent required under data protection principle 3 in cases involving a provision (otherwise than by sale) of personal data to other persons for use in direct marketing for those persons' own purposes.

**Disclosure of personal data obtained without consent from data users**

19. Clause 21 also adds a new section 35R to the Ordinance. The new section 35R creates a new offence for the disclosure of personal data obtained from a data user without the latter's consent. The penalty for the offence is a fine of \$1,000,000 and imprisonment for 5 years.

Explanatory Memorandum  
Paragraph 20

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**Compensation proceedings under section 66 of Ordinance**

20. Under section 66 of the Ordinance, if an individual (*aggrieved person*) suffers damage because of a contravention of a requirement under the Ordinance, the aggrieved person may seek compensation from the data user. Clause 37 amends that section 66 to provide that proceedings (*compensation proceedings*) instituted by an aggrieved person under that section are to be brought in the District Court.
21. Clause 38 adds new sections 66A and 66B to the Ordinance. The new section 66A empowers the Privacy Commissioner for Personal Data (*Commissioner*) to prescribe forms which aggrieved persons and respondents may use in questioning and replying. The new section 66A also provides for various matters relating to the questions and replies. The new section 66B empowers the Commissioner to grant legal assistance in respect of compensation proceedings in cases where the Commissioner thinks fit to do so. Assistance granted may include giving advice, arranging for solicitors' or counsel's advice and arranging for representation relating to compensation proceedings.
22. Clause 42 makes consequential amendment to the District Court Ordinance (Cap. 336) to empower the District Court Rules Committee to make rules regulating the compensation proceedings.

**New powers for Commissioner and immunity**

23. Clause 4 amends section 8 of the Ordinance to provide that the Commissioner may carry out promotional or educational activities and services, and impose reasonable charges for those activities and services, as well as promotional or educational publications and materials.

Explanatory Memorandum

Paragraph 24

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24. Clause 5 adds a new section 11A to the Ordinance to provide that no civil liability will be incurred by the person appointed to be the Commissioner and the staff of the Commissioner for anything done or omitted to be done in good faith in performing the Commissioner's functions and exercising the Commissioner's powers under the Ordinance. The civil liability of the Commissioner as a corporation sole for the thing done or omitted to be done will not be affected.
25. Clause 8 adds a new section 14A to the Ordinance to empower the Commissioner to verify the accuracy of data user returns submitted by data users under section 14 of the Ordinance and to require data users to correct inaccurate information in the returns.

**Enforcement notices**

26. Under section 50 of the Ordinance, if the Commissioner is of the opinion that a data user is contravening or has contravened a requirement under the Ordinance, the Commissioner may, by an enforcement notice, direct the data user to remedy the contravention. Clause 27 amends that section to provide that the notice must, in addition to other information, also set out the act or omission that constitutes the contravention.
27. Clause 28 adds a new section 50A to the Ordinance to impose a heavier penalty for repeated contravention of enforcement notices. The clause also adds a new offence for intentional repetition of an act or omission in contravention of a requirement under the Ordinance in respect of which an enforcement notice has already been served.

Explanatory Memorandum  
Paragraph 28

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## Exemptions

28. Clauses 29 to 34 introduce new exemptions and extend existing exemptions in respect of certain requirements under the Ordinance.
29. Clause 29 adds a new section 51A to the Ordinance to provide exemptions in respect of personal data held by a court, a magistrate or a judicial officer in the course of performing judicial functions.
30. Clause 30 expands the definition of *crime* in section 58 of the Ordinance so that under certain circumstances, personal data held or used in connection with the prevention, detection or prosecution of crimes under the laws of places outside Hong Kong is exempt from specified requirements under the Ordinance.
31. Clause 31 adds a new subsection to section 59 of the Ordinance to extend the scope of exemption on health grounds.
32. Clause 32 adds a new section 59A to the Ordinance to provide for exemption in relation to disclosure of personal data of a minor under certain circumstances.
33. Clause 33 adds new sections 60A and 60B to the Ordinance to provide for exemptions in relation to legal proceedings and related matters.
34. Clause 34 adds various new sections to the Ordinance to provide for new exemptions. The new section 63B introduces an exemption in respect of personal data transferred or disclosed in due diligence exercises conducted in connection with proposed business transactions. The new section 63C provides for an exemption in respect of personal data used for the purposes of emergency rescue operations or emergency relief services. The new section 63D provides for an exemption in respect of personal data contained in records that are transferred to the Government Records Service for archive purposes.

Explanatory Memorandum  
Paragraph 35

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**Data protection principles**

35. Clause 39 amends data protection principle 1 so that a data user may, in compliance with the principle, provide a data subject with the job title, instead of the name, of the individual who is to handle a request for access to and correction of personal data. Clause 40 makes related amendments to Schedule 3.
36. Clause 39 also amends data protection principles 2 and 4 to require a data user who has engaged a data processor, whether within or outside Hong Kong, to adopt contractual or other means to prevent any personal data transferred to the processor from being kept longer than is necessary for processing of the data, and from unauthorized or accidental access, processing, erasure, loss or use of the data.
37. Data protection principle 3 is amended to allow a relevant person of a data subject who is a minor, or is mentally incapacitated or incapable of managing his or her own affairs, to give the consent required for using the data subject's personal data for a new purpose if certain conditions are met. On receiving a consent from a relevant person of the data subject, the data user must not use the data for the new purpose unless the data user has reasonable grounds for believing that the new purpose is clearly in the interest of the data subject.

**Miscellaneous amendments**

38. Clause 3 amends section 2(1) of the Ordinance. The definition of *relevant person* is amended to include guardians of mentally incapacitated persons and persons appointed to perform the functions of guardians, so that the guardians or appointed persons may handle certain matters relating to personal data on behalf of the mentally incapacitated persons.

Explanatory Memorandum

Paragraph 39

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39. Clause 12 amends section 19 of the Ordinance to provide for the manner in which the Hong Kong Police Force is to respond to a data access request as to whether it holds any criminal record of an individual.
40. Clause 13 amends section 20 of the Ordinance to provide additional grounds on which a data user must or may refuse to comply with a data access request. The clause also adds a new subsection to that section to empower a court, a magistrate, the Administrative Appeals Board and its chairman, in deciding on an issue as to whether a data user must or may refuse to comply with a data access request, or any question related to the issue, to require the personal data which is the subject of the request to be made available for their inspection.
41. Clause 17 amends section 26 of the Ordinance to require a data user to take all practicable steps to erase the personal data held if the data is no longer required for the purpose of use.
42. Clause 22 amends section 39 of the Ordinance to provide additional grounds on which the Commissioner may refuse to carry out or decide to terminate an investigation as to whether any requirement under the Ordinance has been contravened.
43. Clause 24 amends section 46 of the Ordinance to provide new circumstances under which the Commissioner may disclose a matter that comes to the Commissioner's knowledge in relation to an inspection of personal data system, a complaint received or an investigation carried out on a complaint.
44. Clause 25 makes technical amendments to section 47 of the Ordinance to improve the procedures for informing a data user of the result of an investigation carried out by the Commissioner.

Explanatory Memorandum

Paragraph 45

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45. Clause 35 amends section 64 of the Ordinance. The original section 64 contains all offence provisions relating to contravention of the requirements under the Ordinance. Most offence provisions have been moved to the individual provisions to which the offences relate (see clauses 7, 9, 11, 15, 18 and 19). The new section 64 now only contains a general offence provision that deals with contravention of requirements (except those relating to data protection principles and those for which only enforcement notices may be served) under the Ordinance for which no offence provisions are provided.
46. Clause 36 adds a new section 64A to the Ordinance to provide that a complaint or information in respect of an offence under the Ordinance may be made to or laid before a magistrate within 2 years from the date of commission of the offence.
47. Clause 43 makes consequential amendments to the Administrative Appeals Board Ordinance (Cap. 442).
48. The Schedule amends various provisions of the Ordinance to reflect the use of the words “personal data” in the singular form.