

**立法會**  
***Legislative Council***

LC Paper No. CB(3) 850/11-12

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Tel : 3919 3308

Date : 1 June 2012

From : Clerk to the Legislative Council

To : All Members of the Legislative Council

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**Council meeting of 6 June 2012**

**Personal Data (Privacy)(Amendment) Bill 2011**

**Committee stage amendments**

Members were informed vide LC Paper No. CB(3) 838/11-12 issued on 30 May 2012 that the President had given permission for the Secretary for Constitutional and Mainland Affairs to move his amendments to the above Bill at the Council meeting of 6 June 2012. Members are invited to note that the President has also given permission for Hon James TO, subject to the Bill receiving a Second Reading, to move his amendments to the Bill.

2. As directed by the President, the amendments are attached for Members' consideration.



(Ms Doris LO)

for Clerk to the Legislative Council

Encl.

Personal Data (Privacy) (Amendment) Bill 2011

**Committee Stage**

Amendment 1 to be moved by the Honourable James TO Kun-sun

Clause

Amendment Proposed

21 By deleting the proposed Part VIA and substituting—

**“Part VIA**

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

**Division 1**

**Interpretation**

**35A. Interpretation of Part VIA**

(1) In this Part—

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

*direct marketing* (直接促銷) means—

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

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

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

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

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

contributions are solicited;

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

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

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

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

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

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

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

(2) For the purposes of this Part, a person provides personal data for gain if the person provides personal data in return for money or other property, irrespective of whether—

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

## **Division 2**

### **Use of Personal Data in Direct Marketing**

#### **35B. Application**

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

- (a) social services run, subvented or subsidized by the Social Welfare Department;
- (b) health care services provided by the Hospital Authority or Department of Health; or
- (c) any other social or health care services which, if not provided, would be likely to cause

serious harm to the physical or mental health of—

- (i) the individual to whom the services are intended to be provided; or
- (ii) any other individual.

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

- (1) Subject to section 35D, a data user who intends to use a data subject's personal data in direct marketing must take each of the actions specified in subsection (2).
- (2) The data user must—
  - (a) inform the data subject—
    - (i) that the data user intends to so use the personal data; and
    - (ii) that the data user may not so use the data unless the data user has received the data subject's consent to the intended use;
  - (b) provide the data subject with the following information in relation to the intended use—
    - (i) the kinds of personal data to be used; and
    - (ii) the classes of marketing subjects in relation to which the data is to be used; and
  - (c) provide the data subject with a channel through which the data subject may, without charge by the data user, communicate the data subject's consent to the intended use.
- (3) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.
- (4) The information provided under subsection (2)(a) and (b) must be presented in a manner that is easily understandable and, if in written form, easily readable.
- (5) Subject to section 35D, a data user who uses a data subject's personal data in direct marketing without taking each of the actions specified in subsection (2) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (6) In any proceedings for an offence under subsection (5), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
- (7) In any proceedings for an offence under subsection

(5), the burden of proving that this section does not apply because of section 35D lies on the data user.

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

(1) If, before the commencement date—

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

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

(2) If—

- (a) a data subject's personal data is provided to a data user by a person other than the data subject (*third person*); and
- (b) the third person has by notice in writing to the data user—
  - (i) stated that sections 35J and 35K have been complied with in relation to the provision of data; and
  - (ii) specified the class of marketing subjects in relation to which the data may be used in direct marketing by the data user, as consented to by the data subject,

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

(3) In this section—

*commencement date* (本部生效日期) means 8 July 2011;  
*relevant personal data* (有關個人資料), in relation to a data subject, means any personal data of the data subject over the use of which a data user had control immediately before the commencement date.

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

- (1) A data user who has complied with section 35C must not use the data subject's personal data in direct marketing unless—
  - (a) the data user has received the data subject's consent to the intended use of personal data, as described in the information provided by the data user under section 35C(2)(b), either generally or selectively;
  - (b) if the consent is given orally, the data user has, within 14 days from receiving the consent, sent a written confirmation to the data subject, confirming—
    - (i) the date of receipt of the consent;
    - (ii) the permitted kind of personal data; and
    - (iii) the permitted class of marketing subjects; and
  - (c) the use is consistent with the data subject's consent.
- (2) For the purposes of subsection (1)(c), the use of personal data is consistent with the data subject's consent if—
  - (a) the personal data falls within a permitted kind of personal data; and
  - (b) the marketing subject in relation to which the data is used falls within a permitted class of marketing subjects.
- (3) A data subject may communicate to a data user the consent to a use of personal data either through a response channel or other means.
- (4) A data user who contravenes subsection (1) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

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

- (1) A data user must, when using a data subject's personal data in direct marketing for the first time, inform the data subject that the data user must, without charge to the data subject, cease to use the data in direct marketing if the data subject so requires.
- (2) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the

data user.

- (3) A data user who contravenes subsection (1) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (4) In any proceedings for an offence under subsection (3), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

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

- (1) A data subject may, at any time, require a data user to cease to use the data subject's personal data in direct marketing.
- (2) Subsection (1) applies irrespective of whether the data subject—
  - (a) has received from the data user the information required to be provided in relation to the use of personal data under section 35C(2); or
  - (b) has earlier given consent to the data user or a third person to the use.
- (3) A data user who receives a requirement from a data subject under subsection (1) must, without charge to the data subject, comply with the requirement.
- (4) A data user who contravenes subsection (3) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
- (6) This section does not affect the operation of section 26.

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

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

**Division 3**

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

**35I. Application**

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

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

- (1) A data user who intends to provide a data subject's personal data to another person for use by that other person in direct marketing must take each of the actions specified in subsection (2).
- (2) The data user must—
  - (a) inform the data subject in writing—
    - (i) that the data user intends to so provide the personal data; and
    - (ii) that the data user may not so provide the data unless the data user has received the data subject's written consent to the intended provision;
  - (b) provide the data subject with the following written information in relation to the intended provision—
    - (i) if the data is to be provided for gain, that the data is to be so provided;
    - (ii) the kinds of personal data to be provided;
    - (iii) the classes of persons to which the data is to be provided; and
    - (iv) the classes of marketing subjects in relation to which the data is to be used; and
  - (c) provide the data subject with a channel through which the data subject may, without



charge by the data user, communicate the data subject's consent to the intended provision in writing.

- (3) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.
- (4) The information provided under subsection (2)(a) and (b) must be presented in a manner that is easily understandable and easily readable.
- (5) A data user who provides personal data of a data subject to another person for use by that other person in direct marketing without taking each of the actions specified in subsection (2) commits an offence and is liable on conviction—
  - (a) if the data is provided for gain, to a fine of \$1,000,000 and to imprisonment for 5 years; or
  - (b) if the data is provided otherwise than for gain, to a fine of \$500,000 and to imprisonment for 3 years.
- (6) In any proceedings for an offence under subsection (5), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

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

- (1) A data user who has complied with section 35J must not provide the data subject's personal data to another person for use by that other person in direct marketing unless—
  - (a) the data user has received the data subject's written consent to the intended provision of personal data, as described in the information provided by the data user under section 35J(2)(b), either generally or selectively;
  - (b) if the data is provided for gain, the intention to so provide was specified in the information under section 35J(2)(b)(i); and
  - (c) the provision is consistent with the data subject's consent.
- (2) For the purposes of subsection (1)(c), the provision of personal data is consistent with the data subject's consent if—
  - (a) the personal data falls within a permitted kind of personal data;
  - (b) the person to whom the data is provided falls within a permitted class of persons; and
  - (c) the marketing subject in relation to which the

data is to be used falls within a permitted class of marketing subjects.

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

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

- (1) A data subject who has been provided with information by a data user under section 35J(2)(b) may, at any time, require the data user—
  - (a) to cease to provide the data subject's personal data to any other person for use by that other person in direct marketing; and
  - (b) to notify any person to whom the data has been so provided to cease to use the data in direct marketing.
- (2) Subsection (1) applies irrespective of whether the data subject has earlier given consent to the provision of the personal data.
- (3) A data user who receives a requirement from a data subject under subsection (1) must, without charge to the data subject, comply with the requirement.
- (4) If a data user is required to notify a person to cease to use a data subject's personal data in direct marketing under a requirement referred to in subsection (1)(b), the data user must so notify the person in writing.
- (5) A person who receives a written notification from a data user under subsection (4) must cease to use the personal data in direct marketing in accordance with the notification.
- (6) A data user who contravenes subsection (3) commits an offence and is liable on conviction—
  - (a) if the contravention involves a provision of personal data of a data subject for gain, to a fine of \$1,000,000 and to imprisonment for 5 years; or

- (b) in any other case, to a fine of \$500,000 and to imprisonment for 3 years.
- (7) A person who contravenes subsection (5) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (8) In any proceedings for an offence under subsection (6) or (7), it is a defence for the data user or person charged to prove that the data user or person took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
- (9) This section does not affect the operation of section 26.

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

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

Personal Data (Privacy) (Amendment) Bill 2011

Committee Stage

Amendment 2 to be moved by the Honourable James TO Kun-sun

Clause

Amendment Proposed

21 By deleting the proposed Part VIA and substituting—

**“Part VIA**

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

**Division 1**

**Interpretation**

**35A. Interpretation of Part VIA**

(1) In this Part—

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

*direct marketing* (直接促銷) means—

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

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

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

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

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

contributions are solicited;

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

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

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

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

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

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

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

- (2) For the purposes of this Part, a person provides personal data for gain if the person provides personal data in return for money or other property, irrespective of whether—
  - (a) the return is contingent on any condition; or
  - (b) the person retains any control over the use of the data.

## Division 2

### Use of Personal Data in Direct Marketing

#### 35B. Application

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

- (a) social services run, subvented or subsidized by the Social Welfare Department;
- (b) health care services provided by the Hospital Authority or Department of Health; or
- (c) any other social or health care services which, if not provided, would be likely to cause

serious harm to the physical or mental health of—

- (i) the individual to whom the services are intended to be provided; or
- (ii) any other individual.

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

- (1) Subject to section 35D, a data user who intends to use a data subject's personal data in direct marketing must take each of the actions specified in subsection (2).
- (2) The data user must—
  - (a) inform the data subject—
    - (i) that the data user intends to so use the personal data; and
    - (ii) that the data user may not so use the data unless the data user has received the data subject's consent to the intended use;
  - (b) provide the data subject with the following information in relation to the intended use—
    - (i) the kinds of personal data to be used; and
    - (ii) the classes of marketing subjects in relation to which the data is to be used; and
  - (c) provide the data subject with a channel through which the data subject may, without charge by the data user, communicate the data subject's consent to the intended use.
- (3) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.
- (4) The information provided under subsection (2)(a) and (b) must be presented in a manner that is easily understandable and, if in written form, easily readable.
- (5) Subject to section 35D, a data user who uses a data subject's personal data in direct marketing without taking each of the actions specified in subsection (2) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (6) In any proceedings for an offence under subsection (5), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
- (7) In any proceedings for an offence under subsection

(5), the burden of proving that this section does not apply because of section 35D lies on the data user.

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

(1) If, before the commencement date—

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

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

(2) If—

- (a) a data subject's personal data is provided to a data user by a person other than the data subject (*third person*); and
- (b) the third person has by notice in writing to the data user—
  - (i) stated that sections 35J and 35K have been complied with in relation to the provision of data; and
  - (ii) specified the class of marketing subjects in relation to which the data may be used in direct marketing by the data user, as consented to by the data subject,

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

(3) In this section—

**commencement date** (本部生效日期) means the date of third reading of the Personal Data (Privacy) (Amendment) Bill 2011;

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

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

- (1) A data user who has complied with section 35C must not use the data subject's personal data in direct marketing unless—
  - (a) the data user has received the data subject's consent to the intended use of personal data, as described in the information provided by the data user under section 35C(2)(b), either generally or selectively;
  - (b) if the consent is given orally, the data user has, within 14 days from receiving the consent, sent a written confirmation to the data subject, confirming—
    - (i) the date of receipt of the consent;
    - (ii) the permitted kind of personal data; and
    - (iii) the permitted class of marketing subjects; and
  - (c) the use is consistent with the data subject's consent.
- (2) For the purposes of subsection (1)(c), the use of personal data is consistent with the data subject's consent if—
  - (a) the personal data falls within a permitted kind of personal data; and
  - (b) the marketing subject in relation to which the data is used falls within a permitted class of marketing subjects.
- (3) A data subject may communicate to a data user the consent to a use of personal data either through a response channel or other means.
- (4) A data user who contravenes subsection (1) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

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

- (1) A data user must, when using a data subject's personal data in direct marketing for the first time, inform the data subject that the data user must, without charge to the data subject, cease to use the data in direct marketing if the data subject so requires.



- (2) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.
- (3) A data user who contravenes subsection (1) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (4) In any proceedings for an offence under subsection (3), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

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

- (1) A data subject may, at any time, require a data user to cease to use the data subject's personal data in direct marketing.
- (2) Subsection (1) applies irrespective of whether the data subject—
  - (a) has received from the data user the information required to be provided in relation to the use of personal data under section 35C(2); or
  - (b) has earlier given consent to the data user or a third person to the use.
- (3) A data user who receives a requirement from a data subject under subsection (1) must, without charge to the data subject, comply with the requirement.
- (4) A data user who contravenes subsection (3) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
- (6) This section does not affect the operation of section 26.

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

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

**Division 3**

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

**35I. Application**

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

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

- (1) A data user who intends to provide a data subject's personal data to another person for use by that other person in direct marketing must take each of the actions specified in subsection (2).
- (2) The data user must—
  - (a) inform the data subject in writing—
    - (i) that the data user intends to so provide the personal data; and
    - (ii) that the data user may not so provide the data unless the data user has received the data subject's written consent to the intended provision;
  - (b) provide the data subject with the following written information in relation to the intended provision—
    - (i) if the data is to be provided for gain, that the data is to be so provided;
    - (ii) the kinds of personal data to be provided;
    - (iii) the classes of persons to which the data is to be provided; and
    - (iv) the classes of marketing subjects in relation to which the data is to be used; and

- (c) provide the data subject with a channel through which the data subject may, without charge by the data user, communicate the data subject's consent to the intended provision in writing.
- (3) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.
- (4) The information provided under subsection (2)(a) and (b) must be presented in a manner that is easily understandable and easily readable.
- (5) A data user who provides personal data of a data subject to another person for use by that other person in direct marketing without taking each of the actions specified in subsection (2) commits an offence and is liable on conviction—
  - (a) if the data is provided for gain, to a fine of \$1,000,000 and to imprisonment for 5 years; or
  - (b) if the data is provided otherwise than for gain, to a fine of \$500,000 and to imprisonment for 3 years.
- (6) In any proceedings for an offence under subsection (5), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

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

- (1) A data user who has complied with section 35J must not provide the data subject's personal data to another person for use by that other person in direct marketing unless—
  - (a) the data user has received the data subject's written consent to the intended provision of personal data, as described in the information provided by the data user under section 35J(2)(b), either generally or selectively;
  - (b) if the data is provided for gain, the intention to so provide was specified in the information under section 35J(2)(b)(i); and
  - (c) the provision is consistent with the data subject's consent.
- (2) For the purposes of subsection (1)(c), the provision of personal data is consistent with the data subject's consent if—
  - (a) the personal data falls within a permitted kind of personal data;
  - (b) the person to whom the data is provided falls

- within a permitted class of persons; and
- (c) the marketing subject in relation to which the data is to be used falls within a permitted class of marketing subjects.
- (3) A data subject may communicate to a data user the consent to a provision of personal data either through a response channel or other written means.
- (4) A data user who contravenes subsection (1) commits an offence and is liable on conviction—
  - (a) if the data user provides the personal data for gain, to a fine of \$1,000,000 and to imprisonment for 5 years; or
  - (b) if the data user provides the personal data otherwise than for gain, to a fine of \$500,000 and to imprisonment for 3 years.
- (5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

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

- (1) A data subject who has been provided with information by a data user under section 35J(2)(b) may, at any time, require the data user—
  - (a) to cease to provide the data subject's personal data to any other person for use by that other person in direct marketing; and
  - (b) to notify any person to whom the data has been so provided to cease to use the data in direct marketing.
- (2) Subsection (1) applies irrespective of whether the data subject has earlier given consent to the provision of the personal data.
- (3) A data user who receives a requirement from a data subject under subsection (1) must, without charge to the data subject, comply with the requirement.
- (4) If a data user is required to notify a person to cease to use a data subject's personal data in direct marketing under a requirement referred to in subsection (1)(b), the data user must so notify the person in writing.
- (5) A person who receives a written notification from a data user under subsection (4) must cease to use the personal data in direct marketing in accordance with the notification.
- (6) A data user who contravenes subsection (3) commits an offence and is liable on conviction—
  - (a) if the contravention involves a provision of personal data of a data subject for gain, to a

fine of \$1,000,000 and to imprisonment for 5 years; or

- (b) in any other case, to a fine of \$500,000 and to imprisonment for 3 years.
- (7) A person who contravenes subsection (5) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (8) In any proceedings for an offence under subsection (6) or (7), it is a defence for the data user or person charged to prove that the data user or person took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
- (9) This section does not affect the operation of section 26.

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

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

Personal Data (Privacy) (Amendment) Bill 2011

**Committee Stage**

Amendment 3 to be moved by the Honourable James TO Kun-sun

Clause

Amendment Proposed

21 By deleting the proposed Part VIA and substituting—

**“Part VIA**

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

**Division 1**

**Interpretation**

**35A. Interpretation of Part VIA**

(1) In this Part—

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

*direct marketing* (直接促銷) means—

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

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

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

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

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

contributions are solicited;

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

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

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

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

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

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

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

(2) For the purposes of this Part, a person provides personal data for gain if the person provides personal data in return for money or other property, irrespective of whether—

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

## **Division 2**

### **Use of Personal Data in Direct Marketing**

#### **35B. Application**

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

- (a) social services run, subvented or subsidized by the Social Welfare Department;
- (b) health care services provided by the Hospital Authority or Department of Health; or
- (c) any other social or health care services which, if not provided, would be likely to cause

serious harm to the physical or mental health of—

- (i) the individual to whom the services are intended to be provided; or
- (ii) any other individual.

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

- (1) Subject to section 35D, a data user who intends to use a data subject's personal data in direct marketing must take each of the actions specified in subsection (2).
- (2) The data user must—
  - (a) inform the data subject—
    - (i) that the data user intends to so use the personal data; and
    - (ii) that the data user may not so use the data unless the data user has received the data subject's consent to the intended use;
  - (b) provide the data subject with the following information in relation to the intended use—
    - (i) the kinds of personal data to be used; and
    - (ii) the classes of marketing subjects in relation to which the data is to be used; and
  - (c) provide the data subject with a channel through which the data subject may, without charge by the data user, communicate the data subject's consent to the intended use.
- (3) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.
- (4) The information provided under subsection (2)(a) and (b) must be presented in a manner that is easily understandable and, if in written form, easily readable.
- (5) Subject to section 35D, a data user who uses a data subject's personal data in direct marketing without taking each of the actions specified in subsection (2) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (6) In any proceedings for an offence under subsection (5), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
- (7) In any proceedings for an offence under subsection



(5), the burden of proving that this section does not apply because of section 35D lies on the data user.

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

(1) If, before the commencement date—

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

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

(2) If—

- (a) a data subject's personal data is provided to a data user by a person other than the data subject (*third person*); and
- (b) the third person has by notice in writing to the data user—
  - (i) stated that sections 35J and 35K have been complied with in relation to the provision of data; and
  - (ii) specified the class of marketing subjects in relation to which the data may be used in direct marketing by the data user, as consented to by the data subject,

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

(3) In this section—

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

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

**35E. Data user must not use personal data in direct**

### **marketing without data subject's consent**

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

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

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

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

- (1) A data subject may, at any time, require a data user to cease to use the data subject's personal data in direct marketing.
- (2) Subsection (1) applies irrespective of whether the data subject—
  - (a) has received from the data user the information required to be provided in relation to the use of personal data under section 35C(2); or
  - (b) has earlier given consent to the data user or a third person to the use.
- (3) A data user who receives a requirement from a data subject under subsection (1) must, without charge to the data subject, comply with the requirement.
- (4) A data user who contravenes subsection (3) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
- (6) This section does not affect the operation of section 26.

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

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

**Division 3**

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

**35I. Application**

- (1) This Division does not apply if a data user provides, otherwise than for gain, personal data of a data subject to another person for use by that other person in offering, or advertising the availability, of—
  - (a) social services run, subvented or subsidized by the Social Welfare Department;
  - (b) health care services provided by the Hospital Authority or Department of Health; or
  - (c) any other social or health care services which,

if not provided, would be likely to cause serious harm to the physical or mental health of—

- (i) the individual to whom the services are intended to be provided; or
  - (ii) any other individual.
- (2) This Division does not apply if a data user provides personal data of a data subject to an agent of the data user for use by the agent in carrying out direct marketing on the data user's behalf.

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

- (1) A data user who intends to provide a data subject's personal data to another person for use by that other person in direct marketing must take each of the actions specified in subsection (2).
- (2) The data user must—
  - (a) inform the data subject in writing—
    - (i) that the data user intends to so provide the personal data; and
    - (ii) that the data user may not so provide the data unless the data user has received the data subject's written consent to the intended provision;
  - (b) provide the data subject with the following written information in relation to the intended provision—
    - (i) if the data is to be provided for gain, that the data is to be so provided;
    - (ii) the kinds of personal data to be provided;
    - (iii) the classes of persons to which the data is to be provided; and
    - (iv) the classes of marketing subjects in relation to which the data is to be used; and
  - (c) provide the data subject with a channel through which the data subject may, without charge by the data user, communicate the data subject's consent to the intended provision in writing.
- (3) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.
- (4) The information provided under subsection (2)(a) and (b) must be presented in a manner that is easily understandable and easily readable.

- (5) A data user who provides personal data of a data subject to another person for use by that other person in direct marketing without taking each of the actions specified in subsection (2) commits an offence and is liable on conviction—
  - (a) if the data is provided for gain, to a fine of \$1,000,000 and to imprisonment for 5 years; or
  - (b) if the data is provided otherwise than for gain, to a fine of \$500,000 and to imprisonment for 3 years.
- (6) In any proceedings for an offence under subsection (5), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

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

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

imprisonment for 5 years; or

- (b) if the data user provides the personal data otherwise than for gain, to a fine of \$500,000 and to imprisonment for 3 years.
- (5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

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

- (1) A data subject who has been provided with information by a data user under section 35J(2)(b) may, at any time, require the data user—
  - (a) to cease to provide the data subject's personal data to any other person for use by that other person in direct marketing; and
  - (b) to notify any person to whom the data has been so provided to cease to use the data in direct marketing.
- (2) Subsection (1) applies irrespective of whether the data subject has earlier given consent to the provision of the personal data.
- (3) A data user who receives a requirement from a data subject under subsection (1) must, without charge to the data subject, comply with the requirement.
- (4) If a data user is required to notify a person to cease to use a data subject's personal data in direct marketing under a requirement referred to in subsection (1)(b), the data user must so notify the person in writing.
- (5) A person who receives a written notification from a data user under subsection (4) must cease to use the personal data in direct marketing in accordance with the notification.
- (6) A data user who contravenes subsection (3) commits an offence and is liable on conviction—
  - (a) if the contravention involves a provision of personal data of a data subject for gain, to a fine of \$1,000,000 and to imprisonment for 5 years; or
  - (b) in any other case, to a fine of \$500,000 and to imprisonment for 3 years.
- (7) A person who contravenes subsection (5) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (8) In any proceedings for an offence under subsection (6) or (7), it is a defence for the data user or person charged to prove that the data user or person took all reasonable precautions and exercised all due

diligence to avoid the commission of the offence.

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

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

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

Personal Data (Privacy) (Amendment) Bill 2011

**Committee Stage**

Amendment 4 to be moved by the Honourable James TO Kun-sun

Clause

Amendment Proposed

21 By deleting the proposed Part VIA and substituting—

**“Part VIA**

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

**Division 1**

**Interpretation**

**35A. Interpretation of Part VIA**

(1) In this Part—

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

*direct marketing* (直接促銷) means—

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

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

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

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

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



contributions are solicited;

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

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

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

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

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

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

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

(2) For the purposes of this Part, a person provides personal data for gain if the person provides personal data in return for money or other property, irrespective of whether—

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

## **Division 2**

### **Use of Personal Data in Direct Marketing**

#### **35B. Application**

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

- (a) social services run, subvented or subsidized by the Social Welfare Department;
- (b) health care services provided by the Hospital Authority or Department of Health; or
- (c) any other social or health care services which, if not provided, would be likely to cause

serious harm to the physical or mental health of—

- (i) the individual to whom the services are intended to be provided; or
- (ii) any other individual.

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

- (1) Subject to section 35D, a data user who intends to use a data subject's personal data in direct marketing must take each of the actions specified in subsection (2).
- (2) The data user must—
  - (a) inform the data subject—
    - (i) that the data user intends to so use the personal data; and
    - (ii) that the data user may not so use the data unless the data user has received the data subject's consent to the intended use;
  - (b) provide the data subject with the following information in relation to the intended use—
    - (i) the kinds of personal data to be used; and
    - (ii) the classes of marketing subjects in relation to which the data is to be used; and
  - (c) provide the data subject with a channel through which the data subject may, without charge by the data user, communicate the data subject's consent to the intended use.
- (3) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.
- (4) The information provided under subsection (2)(a) and (b) must be presented in a manner that is easily understandable and, if in written form, easily readable.
- (5) Subject to section 35D, a data user who uses a data subject's personal data in direct marketing without taking each of the actions specified in subsection (2) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (6) In any proceedings for an offence under subsection (5), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
- (7) In any proceedings for an offence under subsection

(5), the burden of proving that this section does not apply because of section 35D lies on the data user.

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

(1) If, before the commencement date—

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

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

(2) If—

- (a) a data subject's personal data is provided to a data user by a person other than the data subject (*third person*); and
- (b) the third person has by notice in writing to the data user—
  - (i) stated that sections 35J and 35K have been complied with in relation to the provision of data; and
  - (ii) specified the class of marketing subjects in relation to which the data may be used in direct marketing by the data user, as consented to by the data subject,

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

(3) In this section—

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

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

**35E. Data user must not use personal data in direct**

### **marketing without data subject's consent**

- (1) A data user who has complied with section 35C must not use the data subject's personal data in direct marketing unless—
  - (a) the data user has received the data subject's consent to the intended use of personal data, as described in the information provided by the data user under section 35C(2)(b), either generally or selectively;
  - (b) if the consent is given orally, the data user has, within 14 days from receiving the consent, sent a written confirmation to the data subject, confirming—
    - (i) the date of receipt of the consent;
    - (ii) the permitted kind of personal data; and
    - (iii) the permitted class of marketing subjects,
 and the data user has not received any objection from the data subject to the written confirmation within 14 days after the written confirmation is sent to the data subject; and
  - (c) the use is consistent with the data subject's consent.
- (2) For the purposes of subsection (1)(c), the use of personal data is consistent with the data subject's consent if—
  - (a) the personal data falls within a permitted kind of personal data; and
  - (b) the marketing subject in relation to which the data is used falls within a permitted class of marketing subjects.
- (3) A data subject may communicate to a data user the consent to a use of personal data either through a response channel or other means.
- (4) A data user who contravenes subsection (1) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

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

- (1) A data user must, when using a data subject's personal data in direct marketing for the first time, inform the data subject that the data user must, without charge to the data subject, cease to use the

data in direct marketing if the data subject so requires.

- (2) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.
- (3) A data user who contravenes subsection (1) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (4) In any proceedings for an offence under subsection (3), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

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

- (1) A data subject may, at any time, require a data user to cease to use the data subject's personal data in direct marketing.
- (2) Subsection (1) applies irrespective of whether the data subject—
  - (a) has received from the data user the information required to be provided in relation to the use of personal data under section 35C(2); or
  - (b) has earlier given consent to the data user or a third person to the use.
- (3) A data user who receives a requirement from a data subject under subsection (1) must, without charge to the data subject, comply with the requirement.
- (4) A data user who contravenes subsection (3) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
- (6) This section does not affect the operation of section 26.

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

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

**Division 3**

## **Provision of Personal Data for Use in Direct Marketing**

### **35I. Application**

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

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

- (1) A data user who intends to provide a data subject's personal data to another person for use by that other person in direct marketing must take each of the actions specified in subsection (2).
- (2) The data user must—
  - (a) inform the data subject in writing—
    - (i) that the data user intends to so provide the personal data; and
    - (ii) that the data user may not so provide the data unless the data user has received the data subject's written consent to the intended provision;
  - (b) provide the data subject with the following written information in relation to the intended provision—
    - (i) if the data is to be provided for gain, that the data is to be so provided;
    - (ii) the kinds of personal data to be provided;
    - (iii) the classes of persons to which the data is to be provided; and
    - (iv) the classes of marketing subjects in relation to which the data is to be used;

and

- (c) provide the data subject with a channel through which the data subject may, without charge by the data user, communicate the data subject's consent to the intended provision in writing.
- (3) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.
- (4) The information provided under subsection (2)(a) and (b) must be presented in a manner that is easily understandable and easily readable.
- (5) A data user who provides personal data of a data subject to another person for use by that other person in direct marketing without taking each of the actions specified in subsection (2) commits an offence and is liable on conviction—
  - (a) if the data is provided for gain, to a fine of \$1,000,000 and to imprisonment for 5 years; or
  - (b) if the data is provided otherwise than for gain, to a fine of \$500,000 and to imprisonment for 3 years.
- (6) In any proceedings for an offence under subsection (5), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

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

- (1) A data user who has complied with section 35J must not provide the data subject's personal data to another person for use by that other person in direct marketing unless—
  - (a) the data user has received the data subject's written consent to the intended provision of personal data, as described in the information provided by the data user under section 35J(2)(b), either generally or selectively;
  - (b) if the data is provided for gain, the intention to so provide was specified in the information under section 35J(2)(b)(i); and
  - (c) the provision is consistent with the data subject's consent.
- (2) For the purposes of subsection (1)(c), the provision of personal data is consistent with the data subject's consent if—
  - (a) the personal data falls within a permitted kind of personal data;

- (b) the person to whom the data is provided falls within a permitted class of persons; and
  - (c) the marketing subject in relation to which the data is to be used falls within a permitted class of marketing subjects.
- (3) A data subject may communicate to a data user the consent to a provision of personal data either through a response channel or other written means.
- (4) A data user who contravenes subsection (1) commits an offence and is liable on conviction—
  - (a) if the data user provides the personal data for gain, to a fine of \$1,000,000 and to imprisonment for 5 years; or
  - (b) if the data user provides the personal data otherwise than for gain, to a fine of \$500,000 and to imprisonment for 3 years.
- (5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

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

- (1) A data subject who has been provided with information by a data user under section 35J(2)(b) may, at any time, require the data user—
  - (a) to cease to provide the data subject's personal data to any other person for use by that other person in direct marketing; and
  - (b) to notify any person to whom the data has been so provided to cease to use the data in direct marketing.
- (2) Subsection (1) applies irrespective of whether the data subject has earlier given consent to the provision of the personal data.
- (3) A data user who receives a requirement from a data subject under subsection (1) must, without charge to the data subject, comply with the requirement.
- (4) If a data user is required to notify a person to cease to use a data subject's personal data in direct marketing under a requirement referred to in subsection (1)(b), the data user must so notify the person in writing.
- (5) A person who receives a written notification from a data user under subsection (4) must cease to use the personal data in direct marketing in accordance with the notification.
- (6) A data user who contravenes subsection (3) commits an offence and is liable on conviction—
  - (a) if the contravention involves a provision of



personal data of a data subject for gain, to a fine of \$1,000,000 and to imprisonment for 5 years; or

- (b) in any other case, to a fine of \$500,000 and to imprisonment for 3 years.
- (7) A person who contravenes subsection (5) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (8) In any proceedings for an offence under subsection (6) or (7), it is a defence for the data user or person charged to prove that the data user or person took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
- (9) This section does not affect the operation of section 26.

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

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

Personal Data (Privacy) (Amendment) Bill 2011

Committee Stage

Amendment 5 to be moved by the Honourable James TO Kun-sun

Clause

Amendment Proposed

21 By deleting the proposed Part VIA and substituting—

**“Part VIA**

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

**Division 1**

**Interpretation**

**35A. Interpretation of Part VIA**

(1) In this Part—

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

*direct marketing* (直接促銷) means—

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

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

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

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

- (a) any goods, facility or service offered, or the

availability of which is advertised; or

- (b) any purpose for which donations or contributions are solicited;

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

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

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

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

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

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

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

- (2) For the purposes of this Part, a person provides personal data for gain if the person provides personal data in return for money or other property, irrespective of whether—

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

## **Division 2**

### **Use of Personal Data in Direct Marketing**

#### **35B. Application**

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

- (a) social services run, subvented or subsidized by the Social Welfare Department;
- (b) health care services provided by the Hospital

Authority or Department of Health; or

- (c) any other social or health care services which, if not provided, would be likely to cause serious harm to the physical or mental health of—
  - (i) the individual to whom the services are intended to be provided; or
  - (ii) any other individual.

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

- (1) Subject to section 35D, a data user who intends to use a data subject's personal data in direct marketing must take each of the actions specified in subsection (2).
- (2) The data user must—
  - (a) inform the data subject—
    - (i) that the data user intends to so use the personal data; and
    - (ii) that the data user may not so use the data unless the data user has received the data subject's consent to the intended use;
  - (b) provide the data subject with the following information in relation to the intended use—
    - (i) the kinds of personal data to be used; and
    - (ii) the classes of marketing subjects in relation to which the data is to be used; and
  - (c) provide the data subject with a channel through which the data subject may, without charge by the data user, communicate the data subject's consent to the intended use.
- (3) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.
- (4) The information provided under subsection (2)(a) and (b) must be presented in a manner that is easily understandable and, if in written form, easily readable.
- (5) Subject to section 35D, a data user who uses a data subject's personal data in direct marketing without taking each of the actions specified in subsection (2) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (6) In any proceedings for an offence under subsection (5), it is a defence for the data user charged to prove that the data user took all reasonable precautions and

exercised all due diligence to avoid the commission of the offence.

- (7) In any proceedings for an offence under subsection (5), the burden of proving that this section does not apply because of section 35D lies on the data user.

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

- (1) If, before the commencement date—

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

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

- (2) If—

- (a) a data subject's personal data is provided to a data user by a person other than the data subject (*third person*); and
- (b) the third person has by notice in writing to the data user—
  - (i) stated that sections 35K and 35L have been complied with in relation to the provision of data; and
  - (ii) specified the class of marketing subjects in relation to which the data may be used in direct marketing by the data user, as consented to by the data subject,

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

- (3) In this section—

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

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

immediately before the commencement date.

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

- (1) A data user who has complied with section 35C must not use the data subject's personal data in direct marketing unless—
  - (a) the data user has received the data subject's consent to the intended use of personal data, as described in the information provided by the data user under section 35C(2)(b), either generally or selectively;
  - (b) if the consent is given orally, the data user has, within 14 days from receiving the consent, sent a written confirmation to the data subject, confirming—
    - (i) the date of receipt of the consent;
    - (ii) the permitted kind of personal data; and
    - (iii) the permitted class of marketing subjects; and
  - (c) the use is consistent with the data subject's consent.
- (2) For the purposes of subsection (1)(c), the use of personal data is consistent with the data subject's consent if—
  - (a) the personal data falls within a permitted kind of personal data; and
  - (b) the marketing subject in relation to which the data is used falls within a permitted class of marketing subjects.
- (3) A data subject may communicate to a data user the consent to a use of personal data either through a response channel or other means.
- (4) A data user who contravenes subsection (1) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

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

- (1) A data user must, when using a data subject's personal data in direct marketing for the first time, inform the data subject that the data user must, without charge to the data subject, cease to use the data in direct marketing if the data subject so

requires.

- (2) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.
- (3) A data user who contravenes subsection (1) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (4) In any proceedings for an offence under subsection (3), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

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

- (1) A data subject may, at any time, require a data user to cease to use the data subject's personal data in direct marketing.
- (2) Subsection (1) applies irrespective of whether the data subject—
  - (a) has received from the data user the information required to be provided in relation to the use of personal data under section 35C(2); or
  - (b) has earlier given consent to the data user or a third person to the use.
- (3) A data user who receives a requirement from a data subject under subsection (1) must, without charge to the data subject, comply with the requirement.
- (4) A data user who contravenes subsection (3) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
- (6) This section does not affect the operation of section 26.

**35H. Data Subject may require data user to provide source of information**

- (1) If a data user uses a data subject's personal data in direct marketing, the data subject may require the data user to provide him with the following information—
  - (a) whether the personal data was collected from the data subject by the data user;
  - (b) if the personal data was not collected from

the data subject by the data user—

- (i) the kind of personal data of the data subject held by the data user;
  - (ii) whether the personal data was provided by another person to the data user;
  - (iii) the address, if available, and name of that other person;
  - (iv) whether that other person provided the personal data to the data user for direct marketing.
- (2) A data user who receives a requirement from a data subject under subsection (1) must, without charge to the data subject, within 14 days from receiving the requirement, comply with the requirement.
- (3) A data user who receives a requirement from a data subject under subsection (1) and is not able to comply with the requirement must, within 14 days from receiving the requirement, send to the data subject, without charge to the data subject, a signed written declaration which must contain the following—
- (a) the name and address of the data user;
  - (b) the kind of personal data of the data subject held by the data user;
  - (c) the requirement of the data subject received by the data user and the date of making the requirement;
  - (d) the name or job title, and address, of the individual handling the requirement; and
  - (e) a statement that the data user is not able to comply with the requirement.
- (4) A data user who receives a requirement from a data subject under subsection (1) and is not able to comply with the requirement must not use the personal data in direct marketing.
- (5) A data user who contravenes subsection (2), (3) or (4) commits an offence and is liable on conviction to a fine of \$50,000 and to imprisonment for 1 year.
- (6) A data user who, in purported compliance with subsection (3), makes a declaration that he knows to be false or misleading in a material particular, commits an offence and is liable on conviction to a fine of \$50,000 and to imprisonment for 1 year.

### **35I. Prescribed consent for using personal data in direct marketing under data protection principle 3**

Despite section 2(3), where a data user requires, under data protection principle 3, the prescribed consent of a data



subject for using any personal data of the data subject in direct marketing, the data user is to be taken to have obtained the consent if the data user has not contravened section 35C, 35E or 35G.

### **Division 3**

#### **Provision of Personal Data for Use in Direct Marketing**

##### **35J. Application**

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

##### **35K. Data user to take specified action before providing personal data**

- (1) A data user who intends to provide a data subject's personal data to another person for use by that other person in direct marketing must take each of the actions specified in subsection (2).
- (2) The data user must—
  - (a) inform the data subject in writing—
    - (i) that the data user intends to so provide the personal data; and
    - (ii) that the data user may not so provide the data unless the data user has received the data subject's written consent to the intended provision;
  - (b) provide the data subject with the following written information in relation to the intended provision—
    - (i) if the data is to be provided for gain, that the data is to be so provided;

- (ii) the kinds of personal data to be provided;
  - (iii) the classes of persons to which the data is to be provided; and
  - (iv) the classes of marketing subjects in relation to which the data is to be used; and
- (c) provide the data subject with a channel through which the data subject may, without charge by the data user, communicate the data subject's consent to the intended provision in writing.
- (3) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.
- (4) The information provided under subsection (2)(a) and (b) must be presented in a manner that is easily understandable and easily readable.
- (5) A data user who provides personal data of a data subject to another person for use by that other person in direct marketing without taking each of the actions specified in subsection (2) commits an offence and is liable on conviction—
  - (a) if the data is provided for gain, to a fine of \$1,000,000 and to imprisonment for 5 years; or
  - (b) if the data is provided otherwise than for gain, to a fine of \$500,000 and to imprisonment for 3 years.
- (6) In any proceedings for an offence under subsection (5), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

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

- (1) A data user who has complied with section 35K must not provide the data subject's personal data to another person for use by that other person in direct marketing unless—
  - (a) the data user has received the data subject's written consent to the intended provision of personal data, as described in the information provided by the data user under section 35K(2)(b), either generally or selectively;
  - (b) if the data is provided for gain, the intention to so provide was specified in the information under section 35K(2)(b)(i); and
  - (c) the provision is consistent with the data

subject's consent.

- (2) For the purposes of subsection (1)(c), the provision of personal data is consistent with the data subject's consent if—
  - (a) the personal data falls within a permitted kind of personal data;
  - (b) the person to whom the data is provided falls within a permitted class of persons; and
  - (c) the marketing subject in relation to which the data is to be used falls within a permitted class of marketing subjects.
- (3) A data subject may communicate to a data user the consent to a provision of personal data either through a response channel or other written means.
- (4) A data user who contravenes subsection (1) commits an offence and is liable on conviction—
  - (a) if the data user provides the personal data for gain, to a fine of \$1,000,000 and to imprisonment for 5 years; or
  - (b) if the data user provides the personal data otherwise than for gain, to a fine of \$500,000 and to imprisonment for 3 years.
- (5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

**35M. Data Subject may require data user to provide source of information**

- (1) If a data user has provided the personal data of a data subject to another person for that other person to use in direct marketing, the data subject may require the data user to provide him with the following information—
  - (a) whether the personal data was collected from the data subject by the data user;
  - (b) if the personal data was not collected from the data subject by the data user—
    - (i) the kind of personal data of the data subject held by the data user;
    - (ii) whether the data user has provided the personal data to that other person for direct marketing;
    - (iii) whether the personal data was provided by any person to the data user;
    - (iv) the address, if available, and name of that person;
    - (v) whether that person provided the

personal data to the data user for direct marketing.

- (2) A data user who receives a requirement from a data subject under subsection (1) must, without charge to the data subject, within 14 days from receiving the requirement, comply with the requirement.
- (3) A data user who receives a requirement from a data subject under subsection (1) and is not able to comply with the requirement must, within 14 days from receiving the requirement, send to the data subject, without charge to the data subject, a signed written declaration which must contain the following—
  - (a) the name and address of the data user;
  - (b) the kind of personal data of the data subject held by the data user;
  - (c) the requirement of the data subject received by the data user and the date of making the requirement;
  - (d) the name or job title, and address, of the individual handling the requirement; and
  - (e) a statement that the data user is not able to comply with the requirement.
- (4) A data user who receives a requirement from a data subject under subsection (1) and is not able to comply with the requirement must not provide the personal data for use in direct marketing.
- (5) A data user who contravenes subsection (2), (3) or (4) commits an offence and is liable on conviction to a fine of \$50,000 and to imprisonment for 1 year.
- (6) A data user who, in purported compliance with subsection (3), makes a declaration that he knows to be false or misleading in a material particular, commits an offence and is liable on conviction to a fine of \$50,000 and to imprisonment for 1 year.

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

- (1) A data subject who has been provided with information by a data user under section 35K(2)(b) may, at any time, require the data user—
  - (a) to cease to provide the data subject's personal data to any other person for use by that other person in direct marketing; and
  - (b) to notify any person to whom the data has been so provided to cease to use the data in direct marketing.
- (2) Subsection (1) applies irrespective of whether the data subject has earlier given consent to the provision of the personal data.
- (3) A data user who receives a requirement from a data

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

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

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