

**Legislative Council Subcommittee on
Personal Data (Privacy) (Amendment) Ordinance 2012
(Commencement) Notice**

PURPOSE

This paper apprises Members of the preparations made with a view to bringing the remaining provisions in the Personal Data (Privacy) (Amendment) Ordinance 2012 (“Amendment Ordinance”) into operation on 1 April 2013.

BACKGROUND

2. The Personal Data (Privacy) Ordinance (“PDPO”) (Cap. 486), which came into force in 1996, protects the privacy of individuals in relation to personal data. In order to strengthen the protection of personal data privacy, enhance the effectiveness of and improve the operation of the PDPO, the Administration, with the support of the Office of the Privacy Commissioner for Personal Data (“PCPD”), conducted a comprehensive review of the PDPO earlier.

3. The Amendment Ordinance, passed by the Legislative Council on 27 June 2012, introduced amendments to the PDPO, inter alia, to provide for regulation over the use of personal data in direct marketing and provision of personal data for use in direct marketing; to empower the Privacy Commissioner for Personal Data (“Privacy Commissioner”) to provide legal assistance to aggrieved data subjects in bringing proceedings to seek compensation from data users under the PDPO; to create a new offence for disclosure of personal data obtained without consent; to impose a heavier penalty for repeated contravention of enforcement notices; and to create a new offence for repeated

contravention of the requirements under the PDPO for which enforcement notices have been served.

4. Since the timing for commencement of sections 20, 21, 38(2), 39 and 43 (a copy of these sections is at Annex) would be subject to the preparation of relevant guidance by the PCPD and the progress of the promotional activities, no commencement date was specified in the Amendment Ordinance. All the other provisions in the Amendment Ordinance have come into operation since 1 October 2012.

Use of personal data in direct marketing

5. Section 20 of the Amendment Ordinance repeals the existing section 34 of PDPO on the use of personal data in direct marketing. Section 21 of the Amendment Ordinance introduces a new Part VIA governing use of personal data in direct marketing and provision of personal data for use in direct marketing. The provisions are elaborated in paragraphs 6 to 14 below.

6. To provide data subjects with an informed choice as to whether to allow the use of their personal data in direct marketing, the Amendment Ordinance requires a data user who intends to use personal data in direct marketing to, before such use:

- (a) inform the data subject that the data user intends to so use the personal data and that the data user may not do so unless the data user has received the data subject's consent¹ to the intended use;
- (b) inform the data subject of the following in relation to the intended use:
 - (i) the kind(s) of personal data to be used; and
 - (ii) the class(es) of marketing subjects² in relation to which the

¹ "Consent", in relation to use of personal data in direct marketing or provision of personal data for use in direct marketing, includes an indication of no objection to the use or provision.

² "Marketing subject", in relation to direct marketing means (a) any goods, facility or service

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.

The information in (a) and (b) above must be presented in a manner that is easily understandable and, if in written form, easily readable.

7. A data user 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 as described in paragraph 6(b) above;
- (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(s) of personal data; and
 - (iii) the permitted class(es) of marketing subjects³; and
- (c) the use is consistent with the data subject's consent.

8. The requirements in paragraph 7 above would not apply if, before the new provisions relating to direct marketing in the Amendment Ordinance come into operation:

- (a) the data user has explicitly informed the data subject in an easily understandable and, if in writing, easily readable manner of the

offered, or the availability of which is advertised; or (b) any purpose for which donations or contributions are solicited.

³ The "permitted class of marketing subjects" means a class of marketing subject that is specified in the information in paragraph 6(b) above and in relation to which consent is given.

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 the PDPO as in force at the time of the use.

9. When using the personal data of a data subject in direct marketing for the first time, a data user is required to inform the data subject that the data subject may request the data user to cease to so use the data. Moreover, irrespective of whether the data subject has given consent earlier, he may, at any time, require a data user to cease to use his personal data in direct marketing. A data user who receives such a requirement must, without charge to the data subject, comply with the requirement.

10. A data user commits an offence and is liable, on conviction, to a fine of \$500,000 and imprisonment for three years if the data user uses personal data in direct marketing without taking all of the actions in paragraph 6 above, or uses personal data in direct marketing in contravention of paragraph 7 or 9 above. It is a defence for a data user charged to prove that all reasonable precautions have been taken and all due diligence has been exercised to avoid the commission of the offence.

Provision of personal data to another person for use in direct marketing

11. The Amendment Ordinance also requires 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 to, before such provision:

- (a) inform the data subject in writing that the data user intends to so provide the personal data and that the data user may not do so unless the data user has received the data subject's written

consent to the intended provision;

- (b) inform the data subject of the following written information in relation to the intended provision:
 - (i) that the data is to be provided for the data user's gain, if the data is to be so provided;
 - (ii) the kind(s) of personal data to be provided;
 - (iii) the class(es) of persons to which the data is to be provided; and
 - (iv) the class(es) 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.

The information in (a) and (b) above must be presented in a manner that is easily understandable and easily readable.

12. A data user must not provide the data subject's personal data to another person for use in direct marketing unless:

- (a) the data user has received the data subject's written consent to the intended provision as described in paragraph 11(b) above;
- (b) if the data is provided for the data user's gain, the intention to so provide was specified in the information in paragraph 11(b) above; and
- (c) the provision is consistent with the data subject's consent.

13. A data subject who has been provided with information by a data user under paragraph 11(b) above 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.

A data user who receives such a requirement from a data subject must, without charge to the data subject, comply with the requirement. If the data user receives a requirement in (b) above, then the data user must also so notify the person to whom the data has been provided in writing; a person who receives such a notification must, without charge to the data subject, cease to use the personal data in direct marketing in accordance with the notification.

14. A data user commits an offence and is liable, on conviction, to a fine of \$500,000 and imprisonment for three years (\$1,000,000 and imprisonment for five years in the case of provision of personal data for gain) if the data user provides personal data to another person for use by that other person in direct marketing without taking all of the actions in paragraph 11 above, or provides personal data in direct marketing in contravention of paragraph 12 above, or fails to comply with the requirement of the data subject in paragraph 13 above. A person who receives a notification referred to in paragraph 13(b) above but fails to cease to use the personal data in direct marketing in accordance with the notification will commit an offence and be liable, on conviction, to a fine of \$500,000 and imprisonment for three years. It is a defence for a data user or a person charged to prove that all reasonable precautions have been taken and all due diligence has been exercised to avoid the commission of the offence.

Provision of legal assistance

15. Sections 38(2), 39 and 43 of the Amendment Ordinance empower the Privacy Commissioner to provide legal assistance to aggrieved data subjects who intend to institute legal proceedings pursuant to section 66 of the PDPO and provide for related amendments. The assistance the Privacy Commissioner provides may include (a) giving

advice; (b) arranging for the giving of advice or assistance by a solicitor or counsel; (c) arranging for representation by any person, including all such assistance as is usually given by a solicitor or counsel in the steps preliminary or incidental to any proceedings, or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings; and (d) any other form of assistance which the Privacy Commissioner may consider appropriate. Applications for legal assistance may be granted if the Privacy Commissioner thinks fit to do so, in particular, where the case raises a question of principle, or where it is unreasonable to expect the applicant to deal with the case unaided having regard to the complexity of the case or the applicant's position in relation to the respondent or another person involved or any other matter.

PREPARATORY WORK

16. Over the last few months, we have been working with the PCPD with a view to bringing the provisions in the Amendment Ordinance described above into operation.

Provisions relating to direct marketing

17. To prepare data users and data subjects for the new regime governing the use of personal data in direct marketing and provision of personal data for use in direct marketing, a number of publicity and education activities have been/will be conducted by the PCPD, including:

- (a) a new guidance on direct marketing was released on 15 January 2013;
- (b) an information leaflet on the exercise of the right of consent to and opt-out from direct marketing activities was released on 15 January 2013;
- (c) a general briefing to media was held on 15 January 2013;

- (d) an introductory seminar for members of the PCPD's Data Protection Officers' Club was conducted on 22 January 2013;
- (e) a series of training programmes and workshops for different industries including telecommunications, financial services and direct marketing industries have been run from January 2013 onwards;
- (f) the contents of seminars for the public/organisations (which are held about three times each month) have been updated to cover the new regulatory arrangements;
- (g) a dedicated seminar for the Hong Kong Retail Management Association will be held in March 2013; and
- (h) advertisements in professional publications/newsletters of major relevant associations have been/will be placed from January to March 2013.

18. In addition, the PCPD has earlier sponsored the Radio Television Hong Kong to produce a six-episode television drama series “私隱何價” (“Privacy Beyond Price”). The series aims at raising the public's general awareness of the importance of protecting one's personal data, so as to pave way for the commencement of the provisions relating to direct marketing. The drama series was broadcast at TVB Jade Channel for six consecutive Wednesdays from 26 September to 31 October 2012. The PCPD has also made available a nine-chapter short video on the Amendment Ordinance, one of which is to introduce the new regulatory regime on direct marketing. Furthermore, in order to generate coverage in mass media on the new regulatory regime on direct marketing, a special article was published in a free newspaper on 16 October 2012 and a special report was broadcast on a free television station on 31 December 2012.

19. Separately, the Administration is preparing an Announcement in the Public Interest for broadcast from March 2013 on television and radio

to raise the awareness of data subjects of their rights under the new regime. Posters and newspaper advertisements will also be arranged.

Provisions relating to legal assistance

20. To prepare for the launching of the legal assistance scheme, the following publicity measures have been undertaken by the PCPD:

- (a) a short video on the legal assistance scheme was uploaded onto the PCPD website in October 2012;
- (b) an information leaflet on “Legal assistance for civil claims under the Personal Data (Privacy) Ordinance” was released on 15 January 2013; and
- (c) a media briefing was held on 15 January 2013 to introduce the legal assistance scheme.

APPOINTMENT OF COMMENCEMENT DATE

21. Section 1(3) of the Amendment Ordinance provides that sections 20, 21, 38(2), 39 and 43 of the Amendment Ordinance shall come into operation on a day to be appointed by the Secretary for Constitutional and Mainland Affairs (“SCMA”) by notice published in the Gazette. As the PCPD is ready to implement these new sections, the SCMA has therefore appointed 1 April 2013 as the day when sections 20, 21, 38(2), 39 and 43 of the Amendment Ordinance will come into operation.

ADVICE SOUGHT

22. Members are invited to note the content of this paper.

**Constitutional and Mainland Affairs Bureau
February 2013**

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

Section 34—

Repeal the section.

Division 7

Addition of Provisions on Sale and Use of Personal Data

21. Part VIA added

After Part VI—

Add

“Part VIA

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

Division 1

Interpretation

35A. Interpretation of Part VIA

(1) In this Part—

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

direct marketing (直接促銷) means—

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

through direct marketing means;

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

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

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

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

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

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

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

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

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

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

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

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

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

Division 2

Use of Personal Data in Direct Marketing

35B. Application

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

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

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

- (1) Subject to section 35D, a data user who intends to use a data subject's personal data in direct marketing must take each of the actions specified in subsection (2).
- (2) The data user must—
 - (a) inform the data subject—
 - (i) that the data user intends to so use the personal data; and
 - (ii) that the data user may not so use the data unless the data user has received the data subject's consent to the intended use;
 - (b) provide the data subject with the following information in relation to the intended use—
 - (i) the kinds of personal data to be used; and
 - (ii) the classes of marketing subjects in relation to which the data is to be used; and

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

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

- (1) If, before the commencement date—
 - (a) a data subject had been explicitly informed by a data user in an easily understandable and, if informed in writing, easily readable manner of the intended use or use of the data subject's personal data in direct marketing in relation to a class of marketing subjects;
 - (b) the data user had so used any of the data;

- (c) the data subject had not required the data user to cease to so use any of the data; and
- (d) the data user had not, in relation to the use, contravened any provision of this Ordinance as in force as at the time of the use,

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

(2) If—

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

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

(3) In this section—

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

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

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

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

(b) the marketing subject in relation to which the data is used falls within a permitted class of marketing subjects.

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

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

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

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

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

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

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

Division 3

Provision of Personal Data for Use in Direct Marketing

35I. Application

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

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

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

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

- (a) if the data is provided for gain, to a fine of \$1,000,000 and to imprisonment for 5 years; or
 - (b) if the data is provided otherwise than for gain, to a fine of \$500,000 and to imprisonment for 3 years.
- (6) In any proceedings for an offence under subsection (5), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

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

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

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

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

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

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

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

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

38. Section 66 amended (Compensation)

(2) After section 66(4)—

Add

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

39. Sections 66A and 66B added

Part IX, after section 66—

Add

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

- (1) With a view to helping a person (*the person aggrieved*) to decide whether to institute proceedings under section 66 and, if the person does so, to formulate and present his or her case in the most effective manner, the Commissioner may prescribe—
 - (a) forms by which the person aggrieved may question the respondent on the respondent’s reasons for doing any relevant act, or on any other matter which is or may be relevant; and
 - (b) forms by which the respondent may, if he or she so wishes, reply to any questions.
- (2) If the person aggrieved questions the respondent (whether or not in accordance with a form referred to in subsection (1))—
 - (a) the question and any reply by the respondent (whether or not in accordance with such a form) are, subject to subsections (3), (4) and (5), admissible as evidence in the proceedings; and
 - (b) if it appears to the District Court that the respondent, deliberately and without reasonable excuse, omitted to reply within a reasonable period or that the respondent’s reply is evasive or equivocal, the Court may draw any inference from that fact it considers just and equitable to draw.
- (3) The Commissioner may—
 - (a) prescribe the period within which questions must be served in order to be admissible under subsection (2)(a); and
 - (b) prescribe the manner in which a question and any reply by the respondent may be served.

- (4) Rules under the District Court Ordinance (Cap. 336) may empower the District Court entertaining a claim under section 66 to determine, before the date fixed for the hearing of the claim, whether a question or reply is admissible under this section or not.
- (5) This section is without prejudice to any other enactment or rule of law regulating interlocutory and preliminary matters in proceedings before the District Court, and has effect subject to any enactment or rule of law regulating the admissibility of evidence in such proceedings.
- (6) In this section—
respondent (答辯人) includes a prospective respondent.

66B. Commissioner may grant assistance in respect of proceedings

- (1) A person who may institute proceedings to seek compensation under section 66 may make an application to the Commissioner for assistance in respect of those proceedings.
- (2) The Commissioner must consider an application under subsection (1) and may grant it if the Commissioner thinks fit to do so, in particular if—
 - (a) the case raises a question of principle; or
 - (b) it is unreasonable, having regard to the complexity of the case or the applicant's position in relation to the respondent or another person involved or any other matter, to expect the applicant to deal with the case unaided.
- (3) Assistance by the Commissioner under this section may include—
 - (a) giving advice;

- (b) arranging for the giving of advice or assistance by a solicitor or counsel;
 - (c) arranging for representation by any person, including all such assistance as is usually given by a solicitor or counsel in the steps preliminary or incidental to any proceedings, or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings; and
 - (d) any other form of assistance which the Commissioner may consider appropriate.
- (4) Subsection (3)(c) does not affect the law and practice regulating the descriptions of persons who may appear in, conduct, defend and address a court in, any proceedings except to the extent permitted under rules made in accordance with section 73F of the District Court Ordinance (Cap. 336).
- (5) If expenses are incurred by the Commissioner in providing the applicant with assistance under this section, the recovery of those expenses (as taxed or assessed in such manner as may be prescribed by relevant rules) constitutes a first charge for the benefit of the Commissioner—
- (a) on any costs or expenses which are payable to the applicant by any other person (whether by virtue of a judgment or order of the District Court or an agreement or otherwise) in respect of the matter in connection with which the assistance is given; and
 - (b) on the applicant's rights (so far as those rights relate to any costs or expenses) under any compromise or settlement arrived at in connection with that matter to avoid or bring to an end any proceedings.

(6) The charge created by subsection (5) is subject to any charge under the Legal Aid Ordinance (Cap. 91) and to any provision in that Ordinance for payment of any sum into the Supplementary Legal Aid Fund established under that Ordinance.

(7) In this section—

relevant rules (《法院規則》) means any rules made under the District Court Ordinance (Cap. 336);

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

Part 3

Related and Consequential Amendments

Division 1

Amendment to District Court Ordinance (Cap. 336)

43. Section 73F added

Part IV, after section 73E—

Add

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

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

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

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

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

- (c) where there is any conflict or inconsistency between any rules made under the provisions of this section and any rules made under the provisions of another section of this Ordinance, then those first-mentioned rules, to the extent of that conflict or inconsistency, as the case may be, prevail over those second-mentioned rules.
- (9) To avoid doubt, it is declared that no rule made in accordance with this section may empower the Court to hear and determine any proceedings involving any claim beyond its jurisdiction.”.