

**Bills Committee on  
Electronic Health Record Sharing System Bill**

**The Administration's Response to the issues arising from the  
discussion at the meeting on 2 February 2015**

This paper sets out the Administration's response to the issues arising from the discussion of the Bills Committee on the Electronic Health Record Sharing System (eHRSS) Bill on 2 February 2015.

**Issues relating to substitute decision makers (SDMs) of a healthcare recipient (HCR)**

(a) Participation of elderly persons in the Public Private Interface-electronic Patient Record Pilot Project (PPI-ePR)

2. There are over 405,000 HCRs participating in the PPI-ePR as of end December 2014, of which around 71.8% are aged 55 or above and around 49.4% are aged 65 or above. There is no breakdown of these numbers by the HCRs' place of residence, i.e. whether or not they are residents of residential care homes/centres.

3. As we have explained at the last meeting of the Bills Committee on 2 February 2015, at present there is no "SDM" arrangement under the PPI-ePR. To facilitate participation in the future eHRSS by HCRs who are minors, mentally incapacitated persons (MIP) or elderly persons who are incapable of managing their own affairs, the eHRSS Bill provides for an SDM arrangement which would enable guardians, family members or the healthcare providers (HCPs) of the concerned HCR to give a joining or sharing consent on behalf of the HCR. This new SDM arrangement has taken into account the experience learnt from the PPI-ePR and is an improvement over the registration arrangement of the pilot scheme. The interest of those persons who are incapable of managing their own affairs or giving a joining or sharing consent will be better safeguarded instead of undermined, by the implementation of the SDM arrangement.

4. One of the fundamental principles of the eHRSS programme is

that the participation in electronic health record sharing will be voluntary. It is not therefore appropriate, nor practicable, to stipulate in the legislation that a particular SDM would be obliged to make a decision for a HCR.

5. Although comment raised in the last meeting is that for those elderly person residing in residential care home and without guardian or family members, his/her HCP might not be interested in assuming the role of SDM for the elderly. We wish to highlight that under clause 17(5) of the Bill, a licensed residential care home is eligible to be registered as a HCP. Whilst there is no past statistics on HCP/residential care home acting as SDM given that there is no such SDM arrangement in the PPI-ePR at present, we envisage that many residential care homes would have keen interest in participating in eHRSS. Making reference to the PPI-ePR, there are 3,340 participating HCPs as of end December 2014, including 439 residential care homes/centres (the remaining are mainly solo practice private doctors and private hospitals). Upon the launch of the eHRSS, we will also conduct intensive promotion, targeting on elderly and residential care homes, to encourage participation of eHRSS by the elderly.

(b) Cases where eligible SDMs of an MIP hold different views on matters relating to the MIP's participation of the eHRSS

6. A member made a suggestion of referring cases where SDMs of an MIP hold different views on matters relating to the MIP's participation of the eHRSS (such as the joining of the eHRSS and giving of sharing consent to particular HCPs) to the Guardianship Board or the court for resolution. We have accordingly relayed the suggestion to the Labour and Welfare Bureau for consideration.

(c) Eligibility as an SDM of an HCR

7. Some members enquired about whether a "cohabitee" ("同居者") would be eligible as an SDM of an HCR. We have given further thoughts to the suggestion and intend to propose draft amendments to Clause 3(4) of the bill to the effect of adding "a person residing with the

healthcare recipient who accompanies the healthcare recipient at the relevant time” (“與該[醫護]接受者同住的人，而該人在有關時間是陪伴該接受者的”) as a person eligible as an SDM. The amendments are marked in revision mode on an extract of the bill at **Annex A**. Such extension of eligibility will generally cover “cohabitee”, among others. The draft amendments may be further refined subject to views of members and discussion with the Department of Justice (DoJ).

## **Drafting issues**

### (d) The Chinese text of the definition of the term “醫護接受者” (“healthcare recipient”) in Clause 2 of the bill

8. As mentioned in our written response to the letter from the Assistant Legal Advisor (ALA) of the Legislative Council dated 12 May 2014, we take the view that “an individual for whom healthcare is performed” and “接受醫護服務的個人” (an individual who receives healthcare) both reflect the same fact but from different angles only i.e. the giving and receiving ends. If healthcare is “performed” for an individual, it necessitates the fact that the individual “receives” the healthcare performed, otherwise there is arguably no healthcare performed. Since the Chinese text is not a translation of the English text (and vice versa), we would render the Chinese text according to its own linguistic characteristics or usage. We consider that the existing Chinese text of the definition of “醫護接受者” (“healthcare recipient”) (i.e. “曾經、正在或相當可能會接受醫護服務的個人”) in Clause 2 of the bill is in order.

9. At the last meeting of the Bills Committee on 2 February 2015, the ALA and some members noted our clarification but indicated preference for aligning the apparent wording of the bilingual texts of the definition of the above term. Having regard to such preference, we intend to amend the existing Chinese text of the definition of the term to “屬已經、正在或相當可能會進行的醫護服務的對象的個人”, while keeping the existing English text unchanged, as marked in revision mode on an extract of the bill at **Annex B**. This is meant to take into account the above preference without changing the legal meaning or interpretation

of the Chinese text of the definition of the term. The draft amendment may be further refined subject to views of members and discussion with the DoJ.

(e) The term “immediate family member” (“家人”) in Clause 2 of the bill

10. The ALA and some members have also expressed preference for aligning the apparent wording of the bilingual texts of the term “immediate family member” (“家人”) in Clause 2 of the bill. Having regard to such preference, we are prepared to amend the existing English text of the term to “family member”, while keeping the existing Chinese text unchanged. The draft amendment to Clause 2 and the draft consequential amendments to Clause 3 are marked in revision mode on an extract of the bill at **Annex B**. This is meant to take into account the above preference without changing the definition of the above term. The draft amendments may be further refined subject to views of members and discussion with the DoJ.

(f) Limitation of public liability under Clause 57(1) of the bill

11. Some members commented that the expression “The Government or a public officer is not liable because...” in Clause 57(1) of the bill did not make any specific reference to the eHRSS Ordinance. They accordingly asked for examples of provisions in other ordinances on limitation of Government and public officers’ liability in similar circumstances. Members have also enquired about whether the limitation of liability by the clause is concerned with civil liability and/or criminal liability. Our clarification is set out below.

12. The act described in Clause 57(1)(a), (b) and (c) is not a crime. The Government or a public officer will not be prosecuted merely because of such act. For example, a public officer cannot possibly commit an offence merely because of the fact that “the data or information contained in an electronic health record is used in accordance with this [eHRSS] Ordinance” (Clause 57(1)(a)). Therefore, against this background it can be said that the liability that Clause 57(1) seeks to limit implies civil liability only.

13. The act described in Clause 57(1)(a), (b) and (c) has been carefully considered and drafted to restrict to such cases where the likelihood to hold the Government or a public officer civilly liable only because of such act is extremely flimsy. For example, it seems inconceivable that the Government or a public officer should be held liable for damages by a person just because the eHRSS scheme requires him to have successfully applied to become a registered healthcare recipient before he can participate in the eHRSS (Clause 57(1)(b)), or just because he is forbidden to use the data or information in an eHR for research before obtaining the requisite approval (Clause 57(1)(c)). The intended effect of Clause 57(1) is to make it clear and express that, in case of facing any claim on such frivolous ground, the Government or a public officer will not have any liability, thereby dispensing with the need for incurring costs in defending unmeritorious cases. Clause 57(1) therefore has a public interest to serve.

14. The existing formulation of Clause 57(1) is very common among existing ordinances. Some examples are listed for reference in Part (i) of **Annex C**.

15. As regards the query on the limitation of liability specific to a particular ordinance, some relevant provisions are set out in Part (ii) of **Annex C** for reference. The context that necessitates these provisions is different from the context under Clause 57(1) of the eHRSS Bill. The former are concerned with limitation of criminal liability under a particular ordinance whereas Clause 57(1) is intended to limit general civil liability arising purely from certain facts or circumstances. For example, section 7(1) of the Pesticides Ordinance (Cap.133) states that save under and in accordance with a license, no person shall import into or cause to be imported into Hong Kong any registered pesticides. A person who contravenes this requirement commits an offence. It is therefore essential to put in place provisions (i.e. Sections 3A(2) and 7(4) in the Pesticides Ordinance) to exempt the Government or a public officer from such criminal liability in case it is necessary for the Government or a public officer to import a registered pesticides for public administration reasons without or not in accordance with a license.

**Food and Health Bureau**  
**February 2015**

**Proposed draft amendments  
in relation to the definition of “immediate family member”(“家人”)  
and the “substitute decision maker” arrangement**

(Note: Draft amendments are marked in *red* on the following extract of the draft bill.)

\*\*\*\*\*

**2. Interpretation**

(1) In this Ordinance—

.....

~~immediate family member~~ (家人), in relation to a healthcare recipient, means an individual who is related to the recipient by blood, marriage, adoption or affinity.

.....

\*\*\*\*\*

**3. Substitute decision maker**

.....

(2) For a healthcare recipient who is a minor, the following are eligible persons for the purposes of subsection (1)—

.....

(d) in the absence of the persons mentioned in paragraphs (a), (b) and (c), ~~an immediate~~ family member of the healthcare recipient, or a person residing with the healthcare recipient, who accompanies the healthcare recipient at the relevant time;

.....

(4) The following are persons specified for the purposes of subsection (3)—

.....

(f) in the absence of the persons mentioned in paragraphs (a), (b), (c), (d) and (e), ~~an immediate~~ family member of the healthcare recipient, or a person residing with the healthcare recipient, who accompanies the healthcare recipient at the relevant time;

.....

\*\*\*\*\*

**Proposed draft amendments  
in relation to the Chinese text of the definition  
of the term “Healthcare Recipient” (“醫護接受者”)**

(Note: Draft amendments are marked in *red* on the following extract of the draft bill.)

\*\*\*\*\*

2. 釋義

(1) 在本條例中——

.....

醫護接受者 (healthcare recipient)指~~曾經~~正在或相當可能接受醫護服務的個人屬已經、正在或相當可能會進行的醫護服務的對象的個人；

.....

\*\*\*\*\*



**Examples of existing ordinances with provisions on limitation of public liability**

(Note: This summary is meant to provide examples and is not necessarily exhaustive.)

*(i) Ordinances with provisions in which the limitation of liability is not specific to the ordinance*

<b>Ordinance</b>	<b>Extract of relevant provision(s)</b>
Cap. 56 Boilers and Pressure Vessels Ordinance	<u>Section 64 Limitation of public liability and of personal liability of public officers</u> <b>(1) No liability shall rest upon the Government or upon any public officer by reason of the fact that</b> a boiler or pressure vessel and its auxiliary equipment (if any) is registered or is subject to examination or testing under this Ordinance, or by reason of the carrying out by a boiler inspector, an air receiver inspector or a pressurized fuel container inspector, other than such an inspector who is a public officer, of an examination or test pursuant to this Ordinance or a requirement of the Authority made thereunder, or by reason of the carrying out by any other person of any repairs or other work in respect of a boiler or pressure vessel pursuant to or for the purposes of this Ordinance or by reason of any other matter or thing done, or any certificate or report given or made under this Ordinance, by a boiler inspector, an air receiver inspector or a pressurized fuel container inspector, other than such an inspector who is a public officer, or by any other person.
Cap. 123 Buildings Ordinance	<u>Section 37 Limitation of public liability</u> <b>(1) No liability shall rest upon Government or upon any public officer by reason of the fact that</b> any building works are carried out in accordance with the provisions of this Ordinance or that such building works or the plans thereof or materials therefor are subject to inspection or approval by a public officer, nor shall anything in this Ordinance make it obligatory for the Building Authority to inspect any building, building works or materials or the site of any proposed building to ascertain that the provisions of this Ordinance are complied with or that plans, certificates, forms, reports, notices and other documents submitted to him are accurate.

Ordinance	Extract of relevant provision(s)
Cap. 211 Aerial Ropeways (Safety) Ordinance	<p><u>Section 31 Limitation of public liability</u></p> <p><b>No liability shall rest upon the Government or upon any public officer by reason of the fact that</b> any aerial ropeway is subject to examination or to testing by a public officer under this Ordinance or the carrying out of any other work by a public officer pursuant to this Ordinance.</p>
Cap. 215 Eastern Harbour Crossing Ordinance	<p><u>Section 81 Limitation of public liability</u></p> <p><b>No liability shall vest upon the Government or any public officer by reason of the fact that</b> the construction works are carried out in accordance with this Ordinance or that the construction works or the designs, structural details, calculations, method and programme of construction and conditions of contract relating thereto are subject to inspection or approval by a public officer, nor shall anything in this Ordinance make it obligatory for the Director or the Commissioner to inspect the construction works to ascertain that the provisions of this Ordinance are complied with or that any designs, structural details, calculations, or other documents, certificates and notices submitted to him are accurate.</p>
Cap. 301 Hong Kong Airport (Control of Obstructions) Ordinance	<p><u>Section 18 Limitation of public liability</u></p> <p>(1) <b>No liability shall rest upon the Government or upon any public officer by reason of the fact that</b> any building works are carried out in accordance with the provisions of this Ordinance.</p>
Cap 311 Air Pollution Control Ordinance	<p><u>Section 42 Protection of Government and public officers</u></p> <p>(1) <b>No liability shall rest on the Government or upon any public officer by reason of the fact that</b> any licence is granted, renewed, varied, transferred or cancelled, or that any exemption is granted, continued or cancelled, under this Ordinance.</p>

Ordinance	Extract of relevant provision(s)
Cap. 393 Tate's Cairn Tunnel Ordinance	<p><u>Section 56 Limitation of public liability</u></p> <p><b>No liability shall be imposed upon the Government or any public officer by reason of the fact that</b> the construction works are carried out in accordance with this Ordinance and the project agreement or that the construction works or the designs, structural details, calculations, method and programme of construction and conditions of contract relating thereto are subject to inspection or approval by a public officer under the project agreement, nor shall anything in this Ordinance or the project agreement make it obligatory for the Director or the Commissioner to inspect the construction works to ascertain that the provisions of this Ordinance or the project agreement are complied with or that any designs, structural details, calculations, or other documents, certificates and notices submitted to him are accurate.</p>
Cap. 436 Western Harbour Crossing Ordinance	<p><u>Section 69 Limitation of liability</u></p> <p>(1) <b>No liability shall be imposed upon the Government or any public officer-</b></p> <p>(a) <b>by reason of the fact that-</b></p> <p>(i) the construction works are carried out in accordance with this Ordinance or the project agreement; or</p> <p>(ii) the construction works or the designs, structural details, calculations, method and programme of construction or conditions of contract relating thereto are under the project agreement or this Ordinance subject to inspection or approval by a public officer; or</p> <p>(b) <b>in respect of</b> the maintenance or operation of the Western Harbour Crossing by the Company.</p>
Cap. 446 Land Drainage Ordinance	<p><u>Section 49 Limitation of public liability</u></p> <p>(1) Without prejudice to the right to compensation under section 36, <b>no liability shall rest upon the Government or upon any public officer by reason of the fact that</b> any drainage works or works are carried out in accordance with the provisions of this Ordinance, nor shall anything in this Ordinance make it obligatory for the Drainage Authority to inspect any watercourse, land or structure to ascertain that the provisions of this Ordinance are complied with or that plans submitted to him are accurate.</p>

Ordinance	Extract of relevant provision(s)
Cap. 449 Amusement Rides (Safety) Amusement Rides Ordinance	<u>Section 46 Limitation of public liability</u> <b>No liability shall rest upon the Government or upon a public officer by reason of the fact that</b> an amusement ride is subject to examination by a public officer under this Ordinance or the carrying out of any other work by a public officer pursuant to this Ordinance.
Cap. 470 Builders' Lifts and Tower Working Platforms (Safety) Ordinance	<u>Section 44 Limitation of public liability</u> <b>(1) No liability shall rest upon the Government or upon any public officer solely by reason of the fact that</b> any builder's lift or tower working platform is subject to examination or to inspecting, cleaning, oiling and adjusting under the provisions of this Ordinance, or solely by reason of the fact that the safety equipment provided for any builder's lift or tower working platform is subject to testing under the provisions of this Ordinance, or solely by reason of the carrying out of any such examination or test or the inspecting, cleaning, oiling or adjusting of any builder's lift or tower working platform in accordance with the provisions of this Ordinance or the carrying out of any other work pursuant to the provisions of this Ordinance, or solely by reason of the carrying out by the Director of an examination of a builder's lift or tower working platform or a test of the safety equipment provided for a builder's lift or tower working platform, or both, or solely by reason of any other matter or thing done or any certificate or report given or made under the provisions of this Ordinance.
Cap. 473 Land Survey Ordinance	<u>Section 33 Limitation of public liability</u> <b>(1) No liability rests upon the Government or upon any public officer by reason of the fact that</b> any land boundary survey is carried out in accordance with any code of practice approved under this Ordinance, or that any field note, survey record plan or land boundary plan is prepared in accordance with any such code, or that the plans and records resulting from the survey are deposited with the Authority, nor shall anything in this Ordinance make it obligatory for the Authority to ascertain that the requirements of this Ordinance are complied with or that plans and records deposited with the Authority are accurate or consistent with the results of the relevant land boundary surveys or the land boundary record.

Ordinance	Extract of relevant provision(s)
Cap. 474 Tai Lam Tunnel and Yuen Long Approach Road Ordinance	<u>s. 63 Limitation of liability</u> <b>(1) No liability shall be imposed upon the Government or any public officer-</b> <b>(a) by reason of the fact that-</b> (i) the construction works are carried out in accordance with this Ordinance or the project agreement; or (ii) the construction works or the designs, structural details, calculations, method and programme of construction or conditions of contract relating thereto are under this Ordinance or the project agreement subject to inspection or approval by a public officer; or <b>(b) in respect of</b> the maintenance or operation of the Tai Lam Tunnel and Yuen Long Approach Road by the Company.
Cap. 476 Marine Parks Ordinance	<u>s. 23 Protection of the Government and public officers</u> <b>(1) No liability shall rest on the Government or upon any public officer by reason of the fact that</b> any licence or permit is granted under this Ordinance.
Cap. 498 Tsing Ma Control Area Ordinance	<u>s. 29 Limitation of liability</u> <b>No liability (other than that imposed under the terms of a management agreement) shall be imposed upon the Government or any public officer in respect of</b> the management and maintenance of the Area by an operator.
Cap. 514 Patents Ordinance	<u>s. 139A Protection of Government and public officers</u> <b>(1) No liability shall rest on the Government or any public officer by reason of the fact that—</b> (a) any authority is given under section 69; or (b) any import compulsory licence or export compulsory licence is granted under section 72C or 72M (as the case may be).

Ordinance	Extract of relevant provision(s)
Cap. 553 Electronic Transactions Ordinance	<u>s. 51 Protection of public officers</u> <b>(1) No liability is incurred by the Government or a public officer by reason only of the fact that</b> a recognition is granted, renewed, revoked, suspended or reinstated under Part VII.
Cap. 577 Tung Chung Cable Car Ordinance	<u>s. 37 Limitation of liability</u> <b>(1) No liability is incurred by the Government or any public officer by reason only of the fact that-</b> (a) the construction works are carried out in accordance with this Ordinance and the Project Agreement; (b) the construction works are subject to the inspection or approval of a public officer under this or any other Ordinance.
Cap. 594 Tsing Sha Control Area Ordinance	<u>s. 29 Limitation of liability</u> <b>No liability (other than that imposed under a management agreement) is incurred by the Government or any public officer in respect of</b> the management, operation or maintenance of the Control Area by an operator.

(ii) *Ordinances with provisions in which the limitation of liability is specific to the ordinance*

Ordinance	Extract of relevant provision(s)
Cap. 133 Pesticides Ordinance	<u>Section 3A Ordinance applies to Government etc.</u> (1) This Ordinance applies to the Government. (2) Despite subsection (1), <b>the Government—</b> (a) <b>is not liable to be prosecuted for an offence under this Ordinance;</b>
Cap. 610 Buildings Energy Efficiency Ordinance	<u>Section 3 Application to Government</u> (1) Subject to this section, this Ordinance applies to the Government. (2) <b>Neither the Government nor any public officer in the capacity as such is liable to be prosecuted for an offence under this Ordinance.</b>
Cap. 618 Lifts and Escalators Ordinance	<u>Section 4 Ordinance applies to Government etc.</u> (1) This Ordinance applies to the Government. (2) Despite subsection (1), <b>the Government—</b> (a) <b>is not liable to be prosecuted for an offence under this Ordinance;</b>