

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

**The Administration's Response to the issues arising from the
discussion at the meeting on 5 May 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 5 May 2015.

(a) Interpretation of the element "dishonest" in the offences proposed under Clause 41(6)

2. Part 5 of the bill (Clauses 41-46) provides for several proposed new offences. Under Clause 41(6), a person commits an offence if (a) the person knowingly causes (i) access to / (ii) modification of / (iii) impairment to the accessibility, reliability, security or processing of data or information contained in an electronic health record (eHR), and (b) causes the access, modification or impairment (i) with intent to commit an offence / (ii) with a **dishonest** intent to deceive / (iii) with a view to **dishonest** gain for the person or for another / (iv) with a **dishonest** intent to cause loss to another. At the meeting on 5 May 2015, the chairman enquired about the legal interpretation of the element "dishonest" and whether it can be found in existing ordinances.

3. "Dishonest(y)" is a requisite mental element for quite a number of provisions in existing offences. An extract of the relevant provisions is at **Annex**. This element must be proved by the prosecution beyond reasonable doubt. Generally speaking, the law on how to prove dishonesty is quite settled. The leading authority on how to prove dishonesty is *R v Ghosh* [1982] QB 1053; 75 Cr App R 154, CA, which set out the "Ghosh test"¹. In brief, the "Ghosh test" is a two-stage test.

¹ In *R v Ghosh* (supra), Lord Lane concluded that there were two aspects of dishonesty, the objective and the subjective, and that the tribunal of fact, in determining the issue, would have to go through a two-stage process before it would convict the defendant: "In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realized that what he was doing was by those standards dishonest. In most cases, where the

The prosecution has to prove that the act is dishonest in the eyes of an ordinary person (objective element) and that the defendant knew what he did was dishonest (subjective element).

4. Clauses 41(6)(b)(i)-(iv) of the eHRSS Bill were drafted with essentially the same wordings as those of Section 161(1)(a)-(d) of the Crimes Ordinance (Cap. 200). The intention was to maintain consistency (in particular, consistency in the mental element required) in providing for the new offence in Clause 41(6) specifically directed at “data or information in an eHR” (as opposed to “computer” generally) and criminalizing “modification” and “impairment to the accessibility, reliability, security or processing” in addition to “access”. It is worth noting that in respect of the offences under Section 161 of Cap. 200, the test for dishonesty was the “Ghosh test”. The test for dishonesty should be the same for this new offence.

(b) The expression “with a dishonest intent to deceive” in the offence proposed under Clause 41(6)(ii)

Drafting of the clause

5. At the meeting, a member enquired whether the element “dishonest” in the expression “with a dishonest intent to deceive” in the offence in Clause 41(6)(b)(ii) was redundant and should be deleted. We wish to point out that apart from the need to maintain consistency with Section 161 of Cap. 200, “dishonesty” is in any event a separate element to be proved for the offences in relation to theft and deception. The fact that a person knowingly deceives (i.e. the act) does not, of itself, prove the dishonesty (i.e. the intent). Although most deceptions involve dishonesty, the possibility of well-intentioned deceptions cannot be entirely ruled out. The presence of the “mental element” of dishonesty in an offence serves to prevent such well-intentioned deceptions (if there

actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did. For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest.” (at 1064).

happen to be any) from being subject to prosecution under this offence. We consider it appropriate to avoid subjecting the mere act of causing access to / modification of / impairment to the accessibility, reliability, security or processing of data or information contained in an eHR, in the absence of a dishonest intent, to prosecution under the offence in Clause 41(6)(b)(ii). Deleting the mental element of dishonesty will in effect widen the scope of the offence, which is not consistent with our policy intention.

Number of convicted cases

6. At the meeting, the member also enquired whether there were any convicted cases whereby the defendant was charged with obtaining access to a computer with a dishonest intent to deceive, contrary to Section 161(1)(b) of the Crimes Ordinance (Cap. 200). According to the Security Bureau, between 2011 and 2013, there were a total of 128 prosecution cases pertaining to Section 161 of Cap. 200. During the same period, there were 114 convicted cases. There is no further breakdown of the numbers by the sub-sections.

(c) The element “serious harm” in the offences proposed under Clause 46(8)

7. Clause 46 provides for offences relating to direct marketing in the context of eHRSS. Clauses 46(7) and (8) provide for exemptions to these offences i.e. the offences do not apply if the purpose of the concerned use or provision of data or information is “the offering, or the advertising of the availability, of...(c) any other social or healthcare services that, 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”.

8. Clause 46(8)(c) was drafted with essentially the same wording as that of Section 35B(c) and Section 35I(1)(c) of the Personal Data (Privacy) Ordinance (PDPO), which provide for offences relating to direct marketing using personal data in general. Clause 46(8)(c) is intended to provide for comparable circumstances under which the offences under Clause 46 do not apply. Since the expression “serious

harm” is not defined in PDPO, we have not defined the expression in the eHRSS Bill either. It is worth noting that none of the few other local legislations containing the expression “serious harm” has a definition for it either. In the absence of a specific definition in an ordinance nor in the Interpretations and General Clauses Ordinance (Cap. 1), the interpretation of the expression will be based on its ordinary / dictionary meaning. For reference, the term “serious” generally refers to “significant or worrying”, while the term “harm” generally refers to “injury or damage”.

Food and Health Bureau
May 2015

Provisions in existing legislations containing the element “dishonest”

Ordinance	Extract of relevant provision(s)
<p>Cap 41 Insurance Companies Ordinance</p>	<p><u>s.56 Misleading statements etc. and false information; offences</u></p> <p>(1) Any person who, by any statement, promise or representation which he knows to be false, misleading or deceptive, or by any dishonest concealment of material facts, or by the reckless making (dishonest or otherwise) of any statement, promise or representation which is false, misleading or deceptive, induces or attempts to induce another person to enter into or offer to enter into any contract of insurance commits an offence and is liable to a fine at level 6 and imprisonment for 12 months.</p> <p>(2) Any person who causes or permits to be included in-</p> <p>(a) any notice or statement or certificate served or furnished or sent out; or</p> <p>(b) any document or copy of any document deposited,</p> <p>under any provision of this Ordinance a statement which he knows to be false in a material particular or recklessly causes or permits to be so included any statement which is false in a material particular commits an offence and is liable to a fine of \$200000 and, in the case of an individual, to imprisonment for 2 years.</p>
<p>Cap 112 Inland Revenue Ordinance</p>	<p><u>Schedule 9 Transitional Provisions Relating to the Inland Revenue (Amendment) (no. 5) Ordinance 1993</u></p> <p>4. The Commissioner may withdraw the approval given to any retirement scheme under section 87A prior to its repeal by the amending Ordinance if any term or condition of the scheme is altered unless-</p> <p>(a) the alteration is made solely to secure the issue of an exemption certificate in respect of the scheme or registration of the scheme under section 7 or 18 of the Occupational Retirement Schemes Ordinance (Cap 426); or</p> <p>(b) in the case of any other alteration, the Commissioner is notified in writing of such alteration within 1 month after it is made and the scheme, as altered, complies substantially with the requirements set out in paragraph 7.</p> <p>5. Where an application is made under section 7(1) or 15 of the Occupational Retirement Schemes Ordinance (Cap 426) in respect of a retirement scheme which was approved for the time being by the Commissioner under section 87A</p>

Ordinance	Extract of relevant provision(s)
	<p>before its repeal by the amending Ordinance, the employer who operates the scheme shall as soon as reasonably practicable after the determination of the application or appeal (if any) give a notice in writing to the Commissioner of the result of the application and, where an appeal has been made against the refusal of such application under section 19 of the Occupational Retirement Schemes Ordinance (Cap 426), the result of such appeal.</p> <p>6. Section 17(1)(j) applies to a retirement scheme as defined in section 2(1) prior to the commencement of section 2 of the amending Ordinance.</p> <p>7. The requirements referred to in paragraph 4(b) are-</p> <ul style="list-style-type: none"> (a) the retirement scheme shall be exclusively for the benefit of the employee or employees and of the spouse, children, surviving dependants, or legal personal representatives of an employee; (b) each employee concerned shall be entitled to defined benefits and the terms and conditions of the retirement scheme shall have been made known to all the employees concerned; (c) the benefits afforded by the retirement scheme shall accrue only- <ul style="list-style-type: none"> (i) on retirement from the service of the employer at some specified age of not less than 45 years; or (ii) on retirement after some specified period of service with the employer of not less than 10 years; or (iii) on attaining the age of 60 years or some specified age for retirement whichever is the later; or (iv) on earlier incapacity or death: <p>Provided where, however, the retirement scheme provides for proportionate or reduced benefits in the event of an employee leaving the employer's service prior to attaining the specified age or completing the specified period of service, the provision for such benefits shall not in itself disqualify the scheme from retaining the approved status;</p> (d) the nature of the benefits afforded by the retirement scheme shall be the same in relation to all the persons to whom the scheme relates but a scheme relating to more than one class of employee may be regarded as so many separate schemes for this purposes; (e) where the retirement scheme is conducted by a third party to whom the employer makes periodical contributions, the diversion of such contributions to any purposes (other than those of the scheme) and the refund of such contributions to the employer shall, except with the consent of the Commissioner and subject to subparagraph (f),

Ordinance	Extract of relevant provision(s)
	<p>be prohibited;</p> <p>(f) the employer shall have no lien on any sum or other benefit to which the employee would be entitled under the retirement scheme except-</p> <p>(i) to the extent that the employer has suffered a loss due to a dishonest act committed by the employee; or</p> <p>(ii) to the extent of a debt acknowledged in writing by the employee as owing to the employer.</p>
<p>Cap 128 Land Registration Ordinance</p>	<p><u>s.24 Dishonest destruction etc., of memorials and other documents</u></p> <p>(1) Any person who dishonestly, with a view to gain for himself or another, or with intent to cause loss to another, destroys, removes, alters, defaces or conceals-</p> <p>(a) any memorial, or any deed, conveyance or other instrument in writing, or judgment, belonging to, or filed or deposited in, the Land Registry, or any part thereof or endorsement thereon or any microfilm, image or other record thereof; or</p> <p>(b) any register, book, index, receipt, docket or other document belonging to, or filed or deposited in, the Land Registry, or any part thereof or any microfilm, image or other record thereof, commits an offence and is liable on conviction upon indictment to imprisonment.</p> <p>(2) Any person who wilfully or maliciously destroys, removes, alters, defaces or conceals any thing referred to under subsection (1)(a) or (b) commits an offence and is liable to imprisonment and a fine.</p>
<p>Cap 159 Legal Practitioners Ordinance</p>	<p><u>s.9A Complaint about conduct of solicitor, foreign lawyer, etc.</u></p> <p>(1) Where the Council considers that the conduct of a person who is, or was at the relevant time, a solicitor, a foreign lawyer, a trainee solicitor or an employee of a solicitor or foreign lawyer should be inquired into or investigated as a result of a complaint being made to it or otherwise, the Council shall submit the matter to the Tribunal Convenor of the Solicitors Disciplinary Tribunal Panel.</p> <p>(1A) Notwithstanding subsection (1), if the conduct involves an alleged breach of-</p> <p>(a) a provision of this Ordinance;</p> <p>(b) a practice direction issued by the Society; or</p>

Ordinance	Extract of relevant provision(s)
	<p>(c) a principle of professional conduct contained in The Hong Kong Solicitors' Guide to Professional Conduct, prescribed in rules made by the Council, and the Council considers that that matter is suitable for disposal by the Tribunal Convenor under section 9AB, the Council may submit the matter to the Tribunal Convenor for such disposal subject to the conditions mentioned in subsection (1) of that section being satisfied.</p> <p>(1B) In considering whether a matter is suitable for disposal by the Tribunal Convenor under section 9AB, the Council may take into account the following-</p> <ul style="list-style-type: none"> (a) whether the alleged breach is deliberate; (b) whether the alleged breach has been committed with a dishonest intent; (c) the gravity of the alleged breach; (d) any other factor it considers relevant. <p>(2) Where a complaint is made to the Council and the Council does not submit a matter to the Tribunal Convenor under subsection (1) within 6 months after receiving the complaint the Chief Judge may, on application by any person or on his own initiative, submit the matter to the Tribunal Convenor if he considers that the Council ought to have done so.</p> <p><u>s.40F Discipline of notaries public</u></p> <p>(1) A notary public shall be liable to be disciplined under this Part if-</p> <ul style="list-style-type: none"> (a) he has engaged in fraudulent conduct in pursuit of his notarial work; (b) he has engaged in conduct, whether in pursuit of his notarial work or otherwise, which is prejudicial to the administration of justice, or which is dishonest or otherwise discreditable to a notary public, or which is likely to bring the profession of notary public into disrepute; (c) not being exempt from the requirement to comply with a rule made by the Society of Notaries under section 73E, he has failed to comply with that rule; or (d) he has become bankrupt or has entered into a voluntary arrangement with his creditors within the meaning of the Bankruptcy Ordinance (Cap 6).

Ordinance	Extract of relevant provision(s)
	<p>(2) A notary public who is so incapacitated by physical or mental illness as to be unable to carry out notarial work shall be liable to be dealt with under this Part in the same manner as if he was liable to be disciplined under this Part, and for the purposes of any proceedings under this Part in relation to such a person references in this Part to the person's conduct shall be read as references to his state of physical or mental health.</p>
<p>Cap 159M Solicitors (Professional Indemnity) Rules</p>	<p><u>Schedule 3 Exclusion and Conditions</u></p> <p><u>1. Exclusion</u></p> <p>(2) The Company will not provide Indemnity to the indemnified or a former solicitor in respect of-</p> <ul style="list-style-type: none"> (a) (Repealed L.N. 359 of 1993) (b) any claim arising from any notice received by the indemnified prior to 1 October 1989 from any person advising or intimating that it is the intention of such person to hold the indemnified responsible for any act or omission, and any legal proceedings brought in respect of any such act or omission, in connection with the Practice; (c) losses arising out of any claim- <ul style="list-style-type: none"> (i) for death, bodily injury, physical loss or physical damage to property of any kind whatsoever (other than property in the care, custody and control of any of the indemnified in connection with the Practice for which the indemnified is responsible, not being property occupied or used by the indemnified for the purposes of the Practice); (ii) for the payment of a trading debt incurred by the indemnified; (iii) brought about by the dishonesty, fraudulent act or fraudulent omission of any person who was a principal at the relevant time; (iiia) brought about by the dishonesty, fraudulent act or fraudulent omission of an employee of the firm or the indemnified unless the indemnified can prove or show to the satisfaction of the Company that such dishonesty, fraudulent act or fraudulent omission of the employee did not occur as a result of recklessness or dishonesty or a fraudulent act or fraudulent omission on the part of any person who was a principal at the relevant time in the conduct or management of the Practice; <p><u>8. General Conditions</u></p> <p>(6) The Company on behalf of the fund waives any rights of subrogation against any employee of the firm or indemnified save where those rights arise in connection with a dishonest or criminal act by that employee.</p>

Ordinance	Extract of relevant provision(s)
Cap 163 Money Lenders Ordinance	<p><u>s.30 Offences of fraudulent inducement and obstruction</u></p> <p>(1) Any person who by any false, misleading or deceptive statement, representation or promise, or by any dishonest concealment of material facts, fraudulently induces or attempts to induce-</p> <p>(a) any money lender to lend money to any person or to agree to the terms on which money is or is to be borrowed;</p> <p>(b) any person to borrow money from a money lender or to agree to the terms on which money is or is to be lent, commits an offence.</p> <p>(2) Any person who-</p> <p>(a) wilfully obstructs an authorized person in the performance of his functions under section 28; or</p> <p>(b) without reasonable cause fails to give an authorized person such assistance or information as he may require in the performance of such functions, commits an offence.</p> <p>(3) For the purposes of subsection (2), "authorized person" (獲授權的人) means-</p> <p>(a) the Registrar or any other person authorized by him in writing under section 28; or</p> <p>(b) a police officer of or above the rank of superintendent or any other police officer authorized by him in writing under section 28.</p>
Cap 200 Crimes Ordinance	<p><u>s. 161 Access to computer with criminal or dishonest intent</u></p> <p>(1) Any person who obtains access to a computer-</p> <p>(a) with intent to commit an offence;</p> <p>(b) with a dishonest intent to deceive;</p> <p>(c) with a view to dishonest gain for himself or another; or</p> <p>(d) with a dishonest intent to cause loss to another,</p> <p>whether on the same occasion as he obtains such access or on any future occasion, commits an offence and is liable on conviction upon indictment to imprisonment for 5 years.</p> <p>(2) For the purposes of subsection (1) "gain" (獲益) and "loss" (損失) are to be construed as extending not only to</p>

Ordinance	Extract of relevant provision(s)
	<p>gain or loss in money or other property, but as extending to any such gain or loss whether temporary or permanent; and-</p> <p>(a) "gain" (獲益) includes a gain by keeping what one has, as well as a gain by getting what one has not; and</p> <p>(b) "loss" (損失) includes a loss by not getting what one might get, as well as a loss by parting with what one has.</p>
<p>Cap 210 Theft Ordinance</p>	<p><u>s.3 "Dishonestly" (不誠實地)</u></p> <p>(1) A person's appropriation of property belonging to another is not to be regarded as dishonest-</p> <p>(a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or</p> <p>(b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or</p> <p>(c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.</p> <p>(2) A person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property.</p> <p><u>s.16 Dishonest use of public telephone or telex system</u></p> <p>Any person who dishonestly uses a public telephone or telex system with intent to avoid payment shall be guilty of an offence and shall be liable on conviction to imprisonment for 2 years.</p>
<p>Cap 434 Merchant Shipping (Limitation of Shipowners Liability) Ordinance</p>	<p><u>s.22 Exclusion of liability</u></p> <p>(1) Subject to subsection (3), the owner of a Hong Kong ship is not liable for any loss or damage-</p> <p>(a) where any property on board the ship is lost or damaged by reason of fire on board the ship; or</p> <p>(b) where any gold, silver, watches, jewels or precious stones on board the ship are lost or damaged by reason of theft, robbery or other dishonest conduct and their nature and value were not at the time of shipment declared by their owner or shipper to the owner or master of the ship in the bill of lading or otherwise in writing.</p>

Ordinance	Extract of relevant provision(s)
	<p>(2) Subject to subsection (3), where the loss or damage arises from anything done or omitted by any person in his capacity as master or member of the crew or (otherwise than in that capacity) in the course of his employment as a servant of the owner of the ship, subsection (1) also excludes the liability of-</p> <p>(a) the master, member of the crew or servant; and</p> <p>(b) in a case where the master or member of the crew is the servant of a person whose liability would not be excluded by that subsection apart from this paragraph, the person whose servant he is.</p> <p>(3) This section does not exclude the liability of any person for any loss or damage resulting from any such personal act or omission of his as is mentioned in Article 4 of the Convention.</p> <p>(4) In this section "owner" (船東), in relation to a ship, includes any part owner and any charterer, manager or operator of the ship.</p>
<p>Cap 485A Mandatory Provident Fund Schemes (General) Regulation</p>	<p><u>Schedule 3 Contents of Custodial Agreements</u></p> <p>5. Subject to section 11 of this Schedule, the agreement must require the scheme to be indemnified by the custodian-</p> <p>(a) for any direct losses incurred by scheme members that are attributable to fraudulent, dishonest or negligent acts or omissions committed by the custodian or its employees in connection with the performance of the custodian's obligations under the agreement; and</p> <p>(b) for any direct losses attributable to fraudulent, dishonest or negligent acts or omissions committed by delegates of the custodian to the same extent as if the custodian had committed those acts or omissions itself.</p>
<p>Cap 508 Merchant Shipping (Collison Damage Liability and Salvage) Ordinance</p>	<p><u>Schedule 1 International Convention on Salvage 1989</u></p> <p><u>ARTICLE 18 The effect of salvor's misconduct</u></p> <p>A salvor may be deprived of the whole or part of the payment due under this Convention to the extent that salvage operations have become necessary or more difficult because of fault or neglect on his part or if the salvor has been guilty of fraud or other dishonest conduct.</p>

Ordinance	Extract of relevant provision(s)
Cap 571F Securities and Futures (Leveraged Foreign Exchange Trading) (Arbitration) Rules	<p><u>s.35 Exclusion of liability</u></p> <p>None of the following persons is liable to any party for any act or omission in connection with any arbitration conducted under these Rules unless he is found to have been fraudulent or dishonest-</p> <ul style="list-style-type: none"> (a) the chairman; (b) the deputy chairman; (c) a member; (d) the arbitrator; (e) the clerk; (f) a representative of the HKIAC who attends arbitration proceedings in accordance with section 16.
Cap 571AI Securities and Futures (Insurance) Rules	<p><u>Schedule 1 SPECIFIED RISKS</u></p> <p>1. The risks in relation to which a specified licensed corporation shall take out and maintain insurance under these Rules are the risks of loss arising out of the loss of client assets that are received or held by the specified licensed corporation (including client assets that are received or held by an associated entity of the specified licensed corporation) in relation to its carrying on in Hong Kong of a regulated activity, attributable to-</p> <ul style="list-style-type: none"> (a) fraudulent or dishonest conduct by employees of the specified licensed corporation (or its associated entity or service bureau); (b) robbery or theft while the client assets are in the custody of the specified licensed corporation (or its associated entity); (c) forgery or fraudulent alteration of a cheque or other negotiable instrument; (d) fraudulent use of an information system; and (e) forged or fraudulent instructions relating to the client assets. <p>2. For the purposes of this Schedule-</p> <p>"employee" (僱員), in relation to a specified licensed corporation (or its associated entity or service bureau), includes an individual who is or has been an employee, officer or licensed representative of, or who is or has been engaged whether under a contract of service or otherwise by, the specified licensed corporation (or its associated entity or service bureau);</p>

Ordinance	Extract of relevant provision(s)
	<p>"service bureau" (服務單位), in relation to a specified licensed corporation, means a person to whom the specified licensed corporation has delegated the duty to perform certain functions that are ancillary to the carrying on by the specified licensed corporation of any regulated activity.</p>
<p>Cap 622 Companies Ordinance</p>	<p><u>s.448 Liability for untrue or misleading statement in reports</u></p> <p>(1) This section applies to—</p> <p>(a) a directors' report; and</p> <p>(b) a summary financial report so far as it is derived from a directors' report.</p> <p>(2) A director of a company is liable to compensate the company for any loss suffered by the company as a result of—</p> <p>(a) any untrue or misleading statement in the report; or</p> <p>(b) the omission from the report of anything required to be included in it.</p> <p>(3) A director is not liable unless—</p> <p>(a) in the case of subsection (2)(a), the director knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading; or</p> <p>(b) in the case of subsection (2)(b), the director knew the omission to be a dishonest concealment of a material fact.</p> <p>(4) A person is not subject to any liability to another person other than the company resulting from reliance, by that other person or any other person, on information contained in the report.</p> <p>(5) For the purposes of subsection (4), a person is also subject to a liability to another person if that other person is entitled against the person—</p> <p>(a) to be granted any civil remedy; or</p> <p>(b) to rescind or repudiate an agreement.</p> <p>(6) This section does not affect liability for criminal offence.</p>