



立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

來函檔號 YOUR REF : HHB CR 1/3261/24
本函檔號 OUR REF : LS/B/15/2025
電話 TELEPHONE : 3919 3509
電郵 EMAIL : yywwong@legco.gov.hk

By Email (ericalam@healthbureau.gov.hk)

16 April 2025

Ms Erica LAM
Principal Assistant Secretary for Health 6
Health Bureau
19/F, East Wing
Central Government Offices
2 Tim Mei Avenue
Tamar, Hong Kong


Dear Ms LAM,

Electronic Health Record Sharing System (Amendment) Bill 2025

We are scrutinizing the captioned Bill with a view to advising Members on its legal and drafting aspects. To facilitate Members' consideration of the Bill, we should be grateful if you could clarify the matters set out in the **Appendix**.

Please let us have your response in both Chinese and English before the second meeting of the Bills Committee.

Yours sincerely,


(Yvonne WONG)
Assistant Legal Adviser

Encl.

c.c. Department of Justice
(Attn: Mr Anderson CHAN, Senior Government Counsel)
(By email: andersonchan@doj.gov.hk)
(Attn: Mr Michael CHOI, Senior Government Counsel)
(By email: michaelchoi@doj.gov.hk)
Legal Adviser
Senior Assistant Legal Adviser 1
Clerk to the Bills Committee

Clause 1(2) – commencement

1. According to clause 1(2) of the Bill, the Bill (if passed) would come into operation on a day to be appointed by the Secretary for Health by notice published in the Gazette. Please advise Members on the details of the proposed commencement plan on the Bill (if passed), and the reason(s) for the plan.

Clauses 28 and 48 – recognition of non-Hong Kong healthcare providers and non-Hong Kong information infrastructures, and right of appeal to the Administrative Appeals Board

Recognition process

2. In order to be recognized by the Commissioner for the Electronic Health Record (“Commissioner”) as a recognized non-Hong Kong healthcare provider (“HCP”) under the proposed new section 26A(1) of the Electronic Health Record Sharing System Ordinance (Cap. 625) or as a recognized non-Hong Kong public health record system under the proposed new section 26E(1) of Cap. 625, please clarify whether a non-Hong Kong HCP or a non-Hong Kong information infrastructure would be required to make an application to the Commissioner. If so, please clarify why the relevant procedures are not proposed to be added to Cap. 625 by the Bill, as in the current section 19 of Cap. 625 (regarding an application to the Commissioner for registration as a registered HCP for the Electronic Health Record Sharing System (“eHealth System”) by an HCP providing healthcare in Hong Kong). If not, please clarify how the recognition process would be kickstarted and why the Bill does not provide so.

3. Please clarify why the proposed new sections 26A and 26E of Cap. 625 would not require the Commissioner to notify, with reasons, the relevant non-Hong Kong HCP and the operator of the relevant non-Hong Kong information infrastructure if the Commissioner decides not to recognize them as a recognized non-Hong Kong HCP and a recognized non-Hong Kong public health record system under the proposed new sections 26A(1) and 26E(1) of Cap. 625 respectively. It is noted that similar requirements are currently imposed on the Commissioner under section 20(4) of Cap. 625 which deals with, among others, the Commissioner’s refusal to register an HCP providing healthcare in Hong Kong as a registered HCP for the eHealth System.

Suspension and revocation of recognition

4. Please clarify why the proposed new section 26C(1), 26D(1), 26G(1) or 26H(1) of Cap. 625 would not empower the Commissioner to suspend or revoke a recognition of a non-Hong Kong HCP or a non-Hong Kong information infrastructure if the Commissioner is satisfied that the non-Hong Kong HCP or the operator of the non-Hong Kong information infrastructure contravenes a provision of Cap. 625 or a provision of a code of practice (“COP”) issued under section 52 of Cap. 625, as in the current section 24(1)(a)(i) or (ii) or

25(1)(a)(i) or (ii) of Cap. 625 (regarding suspension or cancellation of a registration of a registered HCP by the Commissioner).

Right of appeal

5. Please clarify why the proposed amended section 56 of Cap. 625 would not provide for the right of appeal to the Administrative Appeals Board (“AAB”) by a person who is aggrieved by any of the following decisions of the Commissioner:

- (a) to refuse to recognize a non-Hong Kong HCP as a recognized non-Hong Kong HCP under the proposed new section 26A(1) of Cap. 625;
- (b) to suspend a recognition of a non-Hong Kong HCP as a recognized non-Hong Kong HCP under the proposed new section 26C(1) of Cap. 625;
- (c) to revoke a recognition of a non-Hong Kong HCP as a recognized non-Hong Kong HCP under the proposed new section 26D(1) of Cap. 625;
- (d) to refuse to recognize a non-Hong Kong information infrastructure as a recognized non-Hong Kong public health record system under the proposed new section 26E(1) of Cap. 625;
- (e) to suspend a recognition of a non-Hong Kong information infrastructure as a recognized non-Hong Kong public health record system under the proposed new section 26G(1) of Cap. 625; and
- (f) to revoke a recognition of a non-Hong Kong information infrastructure as a recognized non-Hong Kong public health record system under the proposed new section 26H(1) of Cap. 625.

6. It is noted that a similar right of appeal is currently provided in respect of the Commissioner’s decision to refuse to register an HCP providing healthcare in Hong Kong as an HCP for the eHealth System, or to suspend or cancel a registration of a registered HCP for the eHealth System, under section 56(2)(d), (e) or (f) of Cap. 625.

Clauses 29 and 48 – enforcement notice and right of appeal to the Administrative Appeals Board

7. Pursuant to the proposed new section 26Q(2) of Cap. 625, a specified HCP would be required to provide specified health data of the relevant registered healthcare recipient (“HCR”) to the eHealth System in the form and manner specified by the Commissioner and within a specified period. A specified HCP would mean, according to the proposed new section 26Q(1) of Cap. 625, an HCP that provides healthcare in Hong Kong who is in possession of the specified health data of a registered HCR who has given a relevant sharing consent to the HCP, or has given a relevant joining consent. Please

clarify the reason(s) for excluding a recognized non-Hong Kong HCP from being a specified HCP and accordingly, from the requirement under the proposed new section 26Q(2) of Cap. 625.

8. Please clarify why the Commissioner would be empowered under the proposed new section 26R(4) of Cap. 625 to amend an enforcement notice given to a specified HCP (“Enforcement Notice”) under the proposed new section 26R(1) of Cap. 625 (i.e. directing the specified HCP to provide the specified health data of a registered HCR in accordance with the Enforcement Notice) by another written notice. It is noted that such power is not provided for in relation to an enforcement notice issued under section 38 of the Unsolicited Electronic Messages Ordinance (Cap. 593), or under section 50 of the Personal Data (Privacy) Ordinance (Cap. 486).

9. In the event that an Enforcement Notice (“Original Enforcement Notice”) is amended by the Commissioner by another written notice pursuant to the proposed new section 26R(4) of Cap. 625, please clarify whether or not the Original Enforcement Notice would then be taken to have no effect. Please consider expressly providing the effect of the Original Enforcement Notice in the event of amendment under the proposed new section 26R of Cap. 625.

10. Under the proposed new section 56(2)(g) and the current section 56(3) of Cap. 625, an appeal to the AAB against the Commissioner’s decision to give an Enforcement Notice may only be made within 28 days after the aggrieved person receiving notice of the decision. Where an amendment is made to the Original Enforcement Notice by the Commissioner under the proposed new section 26R(4) of Cap. 625, please clarify whether such time limit for appeal would start to run from the day after the receipt of the amended Enforcement Notice, but not the Original Enforcement Notice, by the relevant specified HCP. If so, please consider whether the current section 56(3) of Cap. 625 should be amended for the sake of clarity.

Clause 40 – offences

11. Clause 40 of the Bill seeks to introduce a new offence relating to purporting to be or holding out as the eHealth System (the proposed new section 41A of Cap. 625) and a new offence relating to the use of the title of eHealth System etc. to mislead others (the proposed new section 41B of Cap. 625). Please clarify:

- (a) whether, according to the Administration’s legislative intent, the offence under the proposed new section 41A of Cap. 625, would not be a strict or absolute liability offence (i.e. the prosecution needs not prove the existence of *mens rea* of committing the offence); and
- (b) the reason(s) for setting the penalty level of each of the offences under the proposed new sections 41A and 41B of Cap. 625 at a fine at level 3 (HK\$10,000). It is noted that different Ordinances have set different penalty

levels for offences relating to unauthorized use of titles. For example, under section 21(2) of The Education University of Hong Kong Ordinance (Cap. 444), section 23(2) of the City University of Hong Kong Ordinance (Cap. 1132) and section 17(2) of the Hong Kong Metropolitan University Ordinance (Cap. 1145), the fine is set at level 6 (HK\$100,000), level 3 (HK\$10,000) and level 5 (HK\$50,000) respectively.

Clauses 43, 52 and 56 – enforcement arrangements in relation to an enforcement notice

Offence relating to enforcement notice

12. Under the proposed new section 47A(1) of Cap. 625 (as added by clause 43 of the Bill), a specified HCP would commit an offence if he or she does not comply with an Enforcement Notice (with statutory defence provided under the proposed new section 47A(3) of Cap. 625). Please clarify:

- (a) whether, according to the Administration's legislative intent, the proposed new offence would be a strict liability offence;
- (b) if so, whether it is the Administration's legislative intent that the implied common law defence of "honest and reasonable mistaken belief" would be available to the specified HCP charged with the proposed new offence;
 - (i) if so, whether the specified HCP would only bear an evidential burden (i.e. the second alternative referred to in *Kulemesin Yuriy and Another v HKSAR* (2013) 16 HKCFAR 195 ("*Kulemesin*")), or would be required to discharge a persuasive burden (i.e. the third alternative referred to in *Kulemesin*), as to the specified HCP's belief; and if it is the Administration's legislative intent that the third alternative referred to in *Kulemesin* would apply, how the derogation of the constitutional right to be presumed innocent under Article 87 of the Basic Law and article 11(1) of the Hong Kong Bill of Rights could satisfy the rationality and proportionality tests laid down in *Hysan Development Co Ltd and Others v Town Planning Board* (2016) 19 HKCFAR 372; and
 - (ii) if not, please clarify why the implied common law defence of "honest and reasonable mistaken belief" would be considered to be replaced or excluded by the statutory defence (i.e. the fourth alternative referred to in *Kulemesin*).

13. Please clarify the reason(s) for providing for a limitation period of two years in the proposed new section 47A(5) of Cap. 625, instead of six months as provided under section 26 of the Magistrates Ordinance (Cap. 227), for a prosecution of the proposed new offence.

14. It is noted that a note is set out at the end of the proposed new section 47A(5) of Cap. 625 stating that the time limit under section 26 of Cap. 227 would be replaced by the time limit provided under the proposed new section 47A(5) of Cap. 625. Please clarify whether the note is intended to have legislative effect and why a status clause is not provided.

15. Please clarify the reason(s) for setting the penalty level of the proposed new offence at a fine at level 5 (HK\$50,000), and a further daily fine of HK\$1,000 if the offence continues after the conviction. It is noted that the penalty levels for offences on failing to comply with an enforcement notice vary in different Ordinances. For example:

- (a) under section 48(1) and (2) of the Aviation Security Ordinance (Cap. 494), the penalty is set, on summary conviction, at a fine at level 3 (HK\$10,000), and on conviction on indictment, at a fine at level 6 (HK\$100,000), and on conviction of a further offence (if, without reasonable excuse, the failure in respect of which the defendant was convicted is continued after the conviction), at a daily fine not exceeding HK\$1,000 during which such further offence continues;
- (b) under section 50A(1) of Cap. 486, the penalty is set, on a first conviction, at a fine at level 5 (HK\$50,000) and imprisonment for two years, and if the offence continues after the conviction, a daily penalty of HK\$1,000, and on a second or subsequent conviction, at a fine at level 6 (HK\$100,000) and imprisonment for two years, and if the offence continues after the conviction, a daily penalty of HK\$2,000; and
- (c) under section 39(2) of Cap. 593, the penalty is set at a fine at level 6 (HK\$100,000) (on a first conviction) and at a fine of HK\$500,000 (on a second or subsequent conviction), and in the case of a continuing offence, a further daily fine of HK\$1,000 during which offence continues.

Compliance of enforcement notice

16. Please clarify whether it is the Administration's legislative intent that, for the purposes of the proposed new section 47B(2)(b) of Cap. 625, and sections 6(2) and 9(4)(b) of the proposed new Schedule 4 to Cap. 625, an Enforcement Notice would be taken to be complied with if the specified HCP has provided the specified health data to the eHealth System in the form and manner as stated in the Enforcement Notice, notwithstanding that the actual provision of the specified health data is made after the date specified in the Enforcement Notice. If so, please consider expressly providing such legislative intent in clauses 43 and 56 of the Bill as appropriate for the avoidance of doubt.

Service of enforcement notice and penalty notice

17. As the Bill does not specify the service method(s) specific to the giving of an Enforcement Notice (failure to comply would be an offence under the proposed new section 47A(1) of Cap. 625), or a penalty notice (not liable to be prosecuted or convicted

for the offence under the proposed new section 47A(1) of Cap. 625 if the fixed penalty has been paid etc.), to a specified HCP by the Commissioner under the proposed new section 26R(1) or 47B(1) of Cap. 625, the applicable service methods would be those set out in the proposed amended section 60 of Cap. 625 (clause 52 of the Bill). In this connection, please clarify why it would be considered appropriate for adopting the existing or proposed new section 60(a)(iii), (b)(iv), (c)(iii) and (d)(iii) of Cap. 625 (i.e. service by electronic mail transmission), and the existing section 60(a)(iv) (i.e. service by text message) of Cap. 625, for the serving of an Enforcement Notice or a penalty notice.

Recovery order

18. Pursuant to section 4(3) of the proposed new Schedule 4 to Cap. 625, a magistrate must cause notice of a recovery order to be served on the person against whom it is made and it may be served by sending it by post to the person's address. Please clarify:

- (a) whether it is the Administration's legislative intent that the proposed amended section 60 of Cap. 625 would not apply to the service of such notice. If so, please consider making appropriate amendment(s) to section 4 of the proposed new Schedule 4 for the sake of clarity; and
- (b) the reason(s) for providing that the said notice may be sent to the person's address, instead of the person's last known address. It is noted that different Ordinances have different requirements on service address(es) in relation to a notice of a recovery order made by a magistrate. For example, under section 10(4) of Schedule 9 to the Wild Animals Protection Ordinance (Cap. 170), such notice may be served by sending it by post to the relevant person's last known address. On the other hand, under section 28G(4) of the Product Eco-responsibility Ordinance (Cap. 603), such notice may be served by sending it by post to the relevant person's address (in the case of an individual) or the relevant person's registered or principal office address (in the case of a body corporate).

Drafting issues

19. In the Chinese texts of the proposed new sections 26T and 26U of Cap. 625, please consider adding “任何” before “可互通資料” as the Chinese renditions of “any” in the English texts of the proposed new sections, as in, for example, the proposed amended section 7(3) of Cap. 625.

20. It is noted that “suspension” and its grammatical variations are rendered as “暫時撤銷” in the Chinese texts of the proposed new sections 26C and 26G of Cap. 625 (clause 28 of the Bill), but are rendered as “暫時吊銷” in the Chinese texts of the existing sections 10 and 24 of Cap. 625. Please consider making appropriate amendments to the relevant Chinese texts for the sake of consistency.

21. In the proposed new section 53A of Cap. 625 (clause 47 of the Bill), please consider deleting “在” in the Chinese text, as “參與” should be an appropriate Chinese rendition of “participates in” in the English text.

22. Please consider adding “.” in the English text, and “。” in the Chinese text, at the end of each of the items under the proposed new Schedule 5 to Cap. 625 (clause 56 of the Bill), as in Part 3 of the proposed amended Schedule 1 to Cap. 625 (clause 55 of the Bill).

Code of practice

23. It is noted that a set of COP has been issued under section 52 of Cap. 625 by the Commissioner in relation to the use of the eHealth System. In view of the substantial changes to the functions of the eHealth System proposed under the Bill, please advise Members whether the Administration has any plan to review and revise the COP, and if so, the relevant timetable.