

# Improving Legal Protection.

## 加強法律權益保障

### WHY THIS IS IMPORTANT

Consumer rights should be protected by law. The Council kept abreast of developments in the law that may affect consumers' positions and welfare as users of goods and services. Also we took all the initiative to improve and protect consumers' legal rights by submitting our views in that regard to the Government and relevant bodies.

### WHAT WE HAVE DONE

#### Report on Unfair Terms in Standard Form Consumer Contract

The Council prepared a report on the unfairness of certain terms that might be found in some local standard form consumer contracts. The Report gave a detailed analysis on the unfairness with a number of examples of terms which contravene the requirement of good faith and/or cause significant imbalance in the contractual rights and obligations of the parties to the detriment of the consumers. The examples include, inter alia, terms that exclude or limit supplier's legal liability for personal injury of consumer resulting from the negligence of supplier which are in fact void under the law, and that give the supplier unilateral right to vary terms generally without specifying a valid reason. The Report also made recommendations to rectify the unfairness, arising from the terms and conditions stipulated in the consumer contracts.

To illustrate further, the Report proposed, with the beauty services as the subject industry, a set of guidelines on drafting standard form consumer contracts and a sample contract.

The Report has been published shortly after the reporting period.

#### Pyramid Schemes Prohibition Bill

In its submission, the Council expressed support to the Bill as it positively responded to the Council's call for plugging the loopholes of the then Pyramid Selling Prohibition Ordinance. The Council appreciated the following improvements proposed by the Bill to the regulatory regime of pyramid schemes, namely:

### 加強法律權益保障的重要性

消費者權益應受法律保障。本會一向關注影響消費者權益的法律發展。此外，本會向政府和有關機構表達意見，以改善及保障消費者的法律權益。

### 我們完成的任務

#### 標準格式消費者合約不公平條款報告

本會就本地標準格式消費者合約中的一些不公平條款撰寫了報告，該報告舉例說明這些條款違反誠信要求及/或導致合約雙方的權利及責任嚴重不平衡，損害消費者利益。例子包括卸除或限制供應商因其疏忽，導致消費者受傷所引起的法律責任，而實際上卻無法律效力的條款，以及供應商單方面修改合約而毋須給予正當理由之條款。此外該報告建議修正合約以確保公平的方法。

該報告亦以美容業為對象，建議一套草擬標準合約的指引及一份合約範本，進一步闡釋如何確保合約公平。

本會於本報告年度過後不久公布該報告。

#### 禁止層壓式計劃條例草案

在書面意見中，本會表示支持草案，因為它正面回應本會有關堵塞當時《禁止層壓式推銷法條例》的漏洞之意見。本會認同草案在規管層壓式計劃方面，所作出的以下改善建議：

- a) to expand the regulatory regime to all pyramid schemes regardless of whether they involve any marketing of goods or services;
- b) to enhance the clarity of the statutory definition of 'pyramid scheme';
- c) to spell out the principle that substance rather than form will count in determining whether a business is a pyramid scheme, and thus tackles evasion of the prohibition by trickery or disguise;
- d) to give guidance for determining 'whether the participation is entirely or substantially induced by the prospect held out to the new participant of entitlement to a recruitment payment', which is the key element of pyramid scheme;
- e) to strengthen the sanction by imposing criminal liability on a participant who has induced or attempted to induce another person to participate in the scheme;
- f) to forestall the tactics of evasion by imposing personal liability on the management of the schemes; and
- g) to empower the court to award compensation to victim of a scheme offence and thus take the burden of expensive litigation from him who may simply recover the compensation ordered as a civil debt.

The Bill was passed on 7 December 2011 and the Ordinance so enacted came into effect on 1 January 2012.

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

The Council welcomed the Administration's initiative to strengthen the protection of data subjects as regards use or provision of personal data for direct marketing and sale of personal data. However, the Council found it unsatisfactory that under the Bill data subjects would be presumed to have consented to the said use, provision or sale, if they do not indicate objection in writing within the prescribed period. The Council submitted that express consent should be obtained from data subjects for the said use, provision or sale because such consent would be genuine.

The Council noted that the Bill required data users to provide a facility without charge through which data subjects may indicate in writing to the data user whether they object to the intended use or provision of their personal data for direct marketing or the intended sale of the data. However, there was no requirement that such a facility shall be reasonably accessible. The Council expressed concern that a data subject

- a) 擴大規管範圍至所有層壓式計劃，無論它們是否涉及貨品或服務的銷售；
- b) 給予「層壓式計劃」更加清晰的法定定義；
- c) 在斷定一個企業是否為層壓式計劃時，體現看重實質而非形式的原則，從而防範逃避規管的詭計或偽裝；
- d) 提供指引，協助斷定層壓式計劃中主要成份即：「參與有關計劃是否完全或在相當程度上由有人向新參與者顯示有機會獲得益所誘使的」；
- e) 對誘使或試圖誘使別人參與計劃的參與者加諸刑事責任，以加強制裁；
- f) 對計劃管理層加諸刑事責任，以防範其以詭計逃避法律責任；及
- g) 授權法庭判令，讓與計劃有關罪行的受害人獲得補償，這樣會減輕受害人在討回補償方面的法律支出，因為他可純粹以追討民事債項方式去討回頒令的補償。

法案於二零一一年十二月七日通過，而法例於二零一二年一月一日生效。

### **個人資料(私隱)條例修訂草案**

本會歡迎政府為直接促銷方面使用或供應個人資料，及在個人資料銷售方面，加強對資料當事人的保護。然而，本會注意到在草案下，若資料當事人在指定期限內沒有書面表示反對，則假設同意上述的使用、供應或銷售，本會認為這是不理想的，故此建議應先取得資料當事人的明確同意才可進行上述的使用、供應或銷售，理由是這樣的同意會是真確的。

本會亦注意到草案要求資料使用人免費提供設施，使資料當事人可以書面方式向資料使用人表示是否反對其在直接促銷方面使用或供應個人資料，或銷售個人資料。然而草案沒有規定這設施必須是合理地易於使用的。本會表示擔心資料當事人可能會遭不合理的回應設施阻礙，以致不能行使其反對的權利。

might be hindered from exercising his right to object by an unreasonable response facility.

The proposed prohibition on disclosure of personal data without data subjects' consent was welcomed. The Council was also supportive of the proposed assistance to aggrieved data subjects to question the data user and to seek compensation from the data user through legal proceedings. The Council believed that legal assistance to aggrieved data subjects might help the establishment of legal principles regarding personal data protection.

### The Draft Mediation Bill

The Council regarded the Draft Bill as a significant step towards the setting up of a good platform for further development of mediation in Hong Kong. In its submission, the Council made a number of suggestions for improvement to the Draft Bill, for instance:

- a) that agreement to mediate through electronic communications should be included in the definition of 'agreement to mediate';
- b) that mediator should be required to be accredited because untrained and non-accredited mediators not only risk harm to the consumers they serve, but also the public confidence in mediation service;
- c) that a fair balance should be sought between the policy promoting effective mediation by requiring confidentiality and administration of justice, by providing for further exceptions to confidentiality of mediation communications;
- d) that the hearing of the leave application for admitting a mediation communication or part of it as evidence should be heard in chambers;
- e) that it should be provided that a person, before accepting an appointment as mediator, shall make reasonable inquiry to determine whether there are any known facts that are reasonably considered to be likely to affect the neutrality or impartiality of the mediation; and disclose any such known fact to the mediation parties as soon as practicable. If the person becomes aware of such a fact subsequent to the acceptance, he also has to disclose it as soon as practicable. Given that neutrality may be at risk, the person shall not accept or shall discontinue the service as a mediator unless the mediation parties agree otherwise.

本會對草案有關禁止在未經資料當事人同意的情况下披露個人資料的建議，表示歡迎，本會亦支持授權個人資料私隱專員協助受屈的資料當事人向資料使用人提問，以及透過法律程序追討賠償的建議條文。本會相信向受屈的資料當事人提供法律協助可有助建立個人資料保障方面的法律原則。

### 調解條例草案草稿

本會認為草案草稿建立良好平台，為香港進一步發展調解服務邁出重要一步。在本會的書面意見中，本會就草案草稿提出若干建議：

- a) 經電子通訊的調解協議應包括在「調解協議」的定義中；
- b) 調解員的資格應予認證，因為未經訓練或認證的調解員不單止可會危害接受服務的消費者之利益，亦會損害公眾對調解服務的信心；
- c) 應就調解通訊的保密原則，制定多些例外情況，使到在要求雙方保密，以促進有效調解，以及秉行公正之間取得適當的平衡；
- d) 向法庭申請接納調解通訊或其中部分為證據的之聆訊，應在內庭處理；
- e) 應規定任何人士在接受擔任調解員的工作前，須作合理的調查，以斷定有否存在任何合理地認為相當可能影響調解的中立性或公正性的已知事實；並須在切實可行的範圍內盡快向調解雙方透露該已知事實。若在接受任命後才發覺這事實，亦須在切實可行的範圍內盡快透露。考慮到中立性可能受到影響，除非調解雙方另行同意，否則有關人士必須拒絕接受或停止提供調解服務。

## Public Consultation on the Legal, Privacy and Security Framework for Electronic Health Record (eHR) Sharing

The Council acknowledged that an effective eHR Sharing System may enable more timely treatment and diagnosis, reduce duplicative diagnostic tests and data collection; and thus, improve not only the personal care of patients but also the healthcare standard of the community at large.

Healthcare data security, as submitted by the Council, would be a primary concern of both patients and healthcare providers. Therefore, it would be appropriate to give them a choice to abstain from joining the proposed eHR Sharing System until they have confidence in its protective measures and mechanism. In this connection, the Council endorsed the proposal that patients and healthcare providers would participate in the proposed System on a voluntary basis.

Given the sensitive nature of healthcare data, the Council also supported the proposal that healthcare providers would be required to obtain the express and informed consent of patients for uploading their data and getting access to their eHR.

In principle, the Council was supportive of the prudent, restrictive and patient-oriented approach adopted by the proposed System. The Council agrees that a reasonable balance should be struck between protection of patients' data privacy and clinical needs of healthcare providers to access and share patients' health data for delivery of healthcare services, while maintaining the professional standard of healthcare. The Council endorsed the proposed provision of 'substitute decision maker' for minors or other patients who are unable to give an informed consent; and the proposed right of healthcare providers to access eHR data under exceptional circumstances (such as emergency) without the subject patient's consent.

To ensure correct diagnosis and clinical decisions, the Council agreed that the sharable scope of eHR should not be restricted by any device or provision on exclusion.

## 就電子健康記錄互通的法律、私隱及保安框架的公眾諮詢

本會同意一個有效的電子健康記錄互通機制可使治療和診症更加及時，減少重複的診症測試及資料搜集，這樣不單只改善病人的個人護理，還可提升社會整體的護理水平。

本會指出醫護資料的保密是病人與醫療服務提供者的主要共同關心事項，因此應給予他們選擇權，讓他們可在對電子健康記錄互通系統的防衛措施和機制產生信心時，才參與該互通系統。因此，本會接納讓病人和醫療服務提供者自願參與該系統的建議。

考慮到醫護資料的敏感性，本會亦支持有關醫療服務提供者須向病人取得明確和知情同意，才可上載或取覽其電子健康記錄之建議。

原則上本會支持建議中的互通系統所採取的謹慎、限制性和病人為本的方案。本會同意在保持醫療專業水平的同時，須在保障病人健康資料方面的私隱；與醫療服務提供者為進行醫護工作而取覽及分享病人健康資料的臨牀需要，兩者之間保持合理平衡。因此，我們支持為不能給予知情同意的未成年人及其他病人設立「代決人」，以及醫療服務提供者有權在例外情況下(如緊急事故)，未經有關病人同意，而取覽其電子健康記錄的建議。

為確保正確診斷和臨床決定，本會同意電子健康記錄的互通範圍不應受任何設置或免除條文限制。

The Council also agreed to the proposal that data kept in the proposed System can be used for public health research after de-identification under a stringent approval mechanism. In addition, the Council suggested that a mechanism should be put in place to monitor the use and retention of the data; and the possibility of such a use and the relevant procedures and safeguards should be stated clearly in the proposed information notice handed out to patients upon their enrolment in the proposed System.

The Council emphasised that the proposed notification of breach must be given timely and effectively to affected or potentially affected data subjects with advice on how they can protect themselves in the circumstances.

It was noted that under the Personal Data (Privacy) Ordinance (Cap 486) a data user's breach of the code of practice approved by the Privacy Commissioner of Personal Data would give rise to a presumption against the data user in any legal proceedings under the Ordinance, though such a breach is not a contravention of the Ordinance. Presumably, the proposed specific eHR legislation is to safeguard privacy of health data which are inherently and highly sensitive information. The Council submitted that the provisions regarding breach of code of practice issued by the proposed eHR Sharing System Operating Body should not be made less stringent than its counterpart stipulated in the Ordinance.

The Council agreed that new criminal offences should be introduced to provide stronger deterrent against unauthorised access to the proposed System with malicious intent.

On the other hand, the Council expressed concern over certain issues in relation to the legal status of manual healthcare records under the proposed eHR legislation.

本會亦同意互通系統保存的資料可在嚴謹的審批機制下，經排除身份識別後，用作公共衛生研究。然而，本會建議應設置機制，監察該些資料的使用和保存，而且當病人加入互通系統時，在給予病人的資料中，應清楚知會病人其資料有可能作此用途，以及有關使用的程序和保障。

本會強調建議中的違反通知必須及時及有效的給予受影響或可能受影響的資料當事人，並同時給予他們意見，使他們在有關情況下能夠保障自己。

在個人資料(私隱)條例(第486章)中，資料使用人違反經個人資料私隱專員批核的實務守則，縱使該違反並非有違該法例的條文，亦會構成對資料使用人在該法例下任何法律程序中下的一項不利假設。建議中有關電子健康記錄的特定法例，想必是保障本質上是高度敏感資料的健康記錄。本會認為在該建議法例中，有關違反由電子健康記錄互通系統營運機構所發出的營運守則的條文，應該跟個人資料(私隱)條例中的相應條文般同樣嚴格。

本會同意應訂立新的刑事罪行，對未獲授權並惡意取用電子健康記錄互通系統資料的行為，予以懲處，以增阻嚇。

另一方面，本會亦對在建議的電子健康記錄法例下，人手健康記錄的法律地位及相關議題，表達關注。