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18 April 2006

Ms Doris CHAN
Legislative Council Secretariat
3/F Citibank Tower
3 Garden Road
Hong Kong

Dear Ms Chan,

Bills Committee on Dentists Registration (Amendment) Bill 2005

————— In the meeting on 28 March 2006, the Bills Committee enquired about-

- (a) the effect of “an appeal to the Court of Appeal shall be deemed to be finally determined when the specified period expires without an application for leave to appeal,” under the amended section 2(3) taking into account that the Court of Appeal or the Court of Final Appeal, as the case may be, have the jurisdiction to extend the specified period for filing an appeal; and
- (b) whether the rules on appeals provided under the amended section 23 were different from -
 - (i) the respective rules provided under the Supplementary Medical Professions Ordinance (Cap. 359) and the Social Workers Registration Ordinance (Cap. 505); and
 - (ii) the Rules of the High Court made under the High Court Ordinance (Cap. 4).

Our reply is as follows-

The amended section 2(3)

Section 2(3) and (4) of the Dentists Registration Ordinance (DRO) were added by the Statute Law (Miscellaneous Provisions) Ordinance 2005 (Part III Division 8) to provide for appeals to the Court of Final Appeal from a judgment of the Court of Appeal. The Ordinance also added similar provisions to 16 other Ordinances, including the Professional Accountants Ordinance (Cap. 50), Legal Practitioners Ordinance (Cap. 159), Medical Registration Ordinance (Cap. 161) and Nurses Registration Ordinance (Cap. 164).

Section 2(3) is a construction clause for the purposes of sections 18(5) (which governs the timing for publication of a disciplinary order in the Gazette) and 22(2) (which governs the timing for removal of a dentist's name from the General Register pursuant to a disciplinary order). The proposed amendment to section 2(3) seeks to extend its effect to the new section 22(2A) (which governs the timing for removal of a dentist's name from the Specialist Register pursuant to a decision of the Dental Council).

The amended section 2(3) defines the earliest opportunity when an appeal to the Court of Appeal is "deemed to be finally determined", before which the Registrar shall not proceed to take the relevant actions, such as removing a dentist's name from the General Register or the Specialist Register [see sections 18(5), 22(2) and (2A)]. Hence section 2(3) will come into operation only if the dentist has appealed to the Court of Appeal.

Where an appeal to the Court of Appeal is not withdrawn or abandoned, the question as to under what circumstances the appeal is deemed to be finally determined hinges on the definition of "specified period" in section 2(4). [see sections 2(3)(b), (c) and (d)]

Members specifically enquired the effect of "an appeal to the Court of Appeal shall be deemed to be finally determined when the specified period expires without an application for leave to appeal". This in fact refers to the scenario in section 2(3)(b). Please note that the definition of "specified period" takes into account the fact that the Court of Appeal has jurisdiction to extend the period for granting leave to appeal to the Court of Final Appeal in respect of a judgment of the Court of Appeal. If an application for such an extension is made *within the 28-day period from the date of the judgment to be appealed*

from and approved, the “specified period” refers to the period so extended. [see section 2(4)(a)(ii)]

Under section 24(6) of the Court of Final Appeal Ordinance (Cap. 484), an application for such an extension may be made even after the expiry of the 28-day period. In this regard, a policy decision has previously been made in the context of the Statute Law (Miscellaneous Provisions) Ordinance 2005 that it would not be practicable to defer the Dental Council Registrar’s relevant actions (e.g. removal of a dentist’s name) indefinitely, as there is no certainty as to when a late application may eventually be made. To reflect the policy intention, if no application for leave or for extension of time is made within the 28-day period, the appeal is “deemed to be finally determined”, and the effect is that the Registrar will proceed to take the relevant actions, according to sections 18(5), 22(2) or 22(2A). Nonetheless, the dentist may still make an application for extension after the 28-day period has expired.

The amended section 2(3) thus only affects when the Registrar may gazette an order and execute it (in removal case) where an appeal to the Court of appeal is made, but does not affect the length of time within which the dentist can apply for leave to appeal to the Court of Final Appeal.

The amended section 23

Section 23, if amended according to the proposed committee stage amendments, provides for an appeal to the Court of Appeal against the Council’s orders under sections 9(3), 15, 15A(2) or 18 and its decisions against the application made under the proposed section 12B(1).

In general terms, the practice in relation to an appeal under section 23 follows the Rules of High Court (see section 23(3) of DRO). There is however a clear intention in DRO that the Court of Appeal has no power to hear an appeal unless a notice of appeal is given within the period specified in the proposed section 23(3A), although in the Rules of the High Court (Cap. 4A) the time required for effecting the service of a notice of appeal, subject to certain exceptions, is 28 days [Order 59 Rule 4(1)(c)] and the Court of Appal has power to extend the time limit.

The proposed section 23(3A) is a recast of the proviso to the existing section 23(3) to modernize the language, with consequential amendments arising from the introduction of the Specialist Register. The

original policy intention to impose a time limit (i.e. one month of the service of the Council's order) for giving notice of the appeal against an order remains the same. The existing provision preserves the original legislative intent that the Court of Appeal shall not have power to hear the appeal if the notice of appeal is given out of the one month period.

Provisions which limit the time to lodge an appeal against a decision or an order of a regulatory body with the Court of Appeal can also be found in other Ordinances, e.g. Medical Registration Ordinance, Cap. 161 (see section 26), Nurses Registration Ordinance, Cap. 164 (see section 22), Supplementary Medical Professions Ordinance, Cap. 359 (see section 25), and Social Workers Registration Ordinance, Cap. 505 (see section 33). In the case of doctors, nurses, supplementary medical professionals and social workers, the time within which the notice of appeal shall be lodged is one month, 30 days, one and three months respectively.

In the context of dentists, we consider that the appeal period of one month is appropriate, having regard to the need to strike a balance between providing a reasonable avenue of redress for dentists and ensuring sufficient protection of public health.

Yours sincerely,

(Jeff LEUNG)
for Secretary for Health, Welfare and Food