

立法會
Legislative Council

LC Paper No. LS56/07-08

**Paper for the House Committee Meeting
on 29 February 2008**

**Further Report by Legal Service Division on
Accreditation of Academic and
Vocational Qualifications (Appeal) Rules (L.N. 25)
gazetted on 15 February 2008**

The Accreditation of Academic and Vocational Qualifications Ordinance (6 of 2007) (“the Ordinance”) provides for matters relating to accreditation of academic and vocational qualifications, and for related and consequential matters. The Accreditation of Academic and Vocational Qualifications (Appeal) Rules (“the Rules”) are made by the Rules Committee under section 17(2) of the Ordinance to provide for matters relating to the lodging of appeals to the Appeal Board against decisions and determinations made by the Accreditation Authority or Qualifications Register Authority relating to the Qualifications Framework established under the Ordinance.

2. In the report of the Legal Service Division (“LSD”) for the House Committee meeting on 22 February 2008 (LC Paper No. LS50/07-08), it was reported that LSD was seeking clarification from the Administration on a few drafting points in the Rules, and would submit a further report if necessary. LSD’s letter and the Administration’s reply are attached at Annexes I and II respectively. The more important issues are summarized as follows:

- (a) Whether an express provision should be added to provide for the respondent’s failure to serve documents as required under section 5 of the Rules

Section 4(1) of the Rules requires the appellant to serve documents on the Appeal Board and the respondent within the specified time limit. Section 4(2) provides that the Appeal Board may dismiss the appeal if it is satisfied that the appellant has failed to comply with section 4(1). While section 5 imposes a similar requirement on the respondent regarding service of documents, there is no provision on what is to happen if the respondent fails to comply with the requirement. LSD has asked the Administration to consider whether it is necessary to include an express provision to cover this matter. In reply, the Administration stated that such a provision is not necessary for reasons set out in paragraph (d) in the Annex to the Administration’s reply relating to sections 4 and 5 of the Rules. In gist, the Administration considers that such a provision is not necessary as the Appeal Board may rely on section 14(1)(a) of the Ordinance to determine the practice or procedure to be adopted in the event that the respondent fails to serve the relevant documents.

(b) Chinese text of “fully and fairly” in section 3(3)(b) of the Rules

Section 3(3)(b) of the Rules provides that a notice of appeal shall be accompanied by a statement of facts relied on as may suffice to enable the Appeal Board and the respondent to be fully and fairly informed of the grounds of appeal. LSD has asked the Administration the reason for using “不偏不倚” as the Chinese text for “fairly” in the above context given that “fairly” has the ordinary meaning of “completely” and “fully” and that “充分而全面” is the more commonly adopted Chinese rendition for “fully and fairly” in similar contexts in existing legislation. After giving further thoughts to the matter, the Administration proposes to amend the Chinese text concerned to “全面而中肯地”. The same Chinese text has been used in a similar context in section 28(2)(e) of the Urban Renewal Authority Ordinance (Cap. 563).

(c) Other proposed amendments to the Rules

The Administration also proposes other amendments to improve the clarity and drafting of the Rules. These amendments are set out below:

- (i) The definitions of “appellant” and “appeal” provided in section 9 of the Ordinance will be included in section 2 of the Rules;
- (ii) section 4 will be amended to the effect that the appellant is required to serve documents on the Appeal Board within the specified time limit or such further period as the presiding officer may on application allow. This will make the practice and procedure consistent with that applicable to service of documents by the respondent under section 5 of the Rules; and
- (iii) to make the wording used in section 11 of the Rules consistent with that used in section 14(1)(b) and (c) of the Ordinance, section 11 will be amended to the effect that any document, statement, notice or article required to be served or lodged for the purposes of an appeal may be served or lodged in person or by post.

3. A copy of the draft resolution to amend the Rules is attached at Annex III. With the proposed amendments, LSD is of the view that the legal and drafting aspects of the Rules present no problem. Subject to Members’ views, the Administration proposes to move a motion to amend the Rules at the Council meeting on 12 March 2008.

Encl.

Prepared by

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28 February 2008

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20 February 2008

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Dear Mr WU,

**Accreditation of Academic and Vocational Qualifications (Appeal) Rules
(L.N. 25 of 2008)**

I am scrutinising the above Rules with a view to advising Members and should be grateful if you could clarify the following matters:

Section 2

Apart from defining “Appeal Board”, “notice of appeal”, “presiding officer” and “respondent”, is it necessary to define “appellant” as well? If it is intended that the definition of “appellant” in section 9 of the Accreditation of Academic and Vocational Qualifications Ordinance (6 of 2007) (the principal Ordinance) should apply in the context of the above Rules, please also include the said definition in section 2 of the Rules.

Section 3

In section 3(3)(b), is there any reason for using “不偏不倚” as the Chinese text for “fairly” in the context of “fully and fairly”? According to *The New Shorter Oxford Dictionary* (1993 edition), “fairly” has the meaning of “completely” and “fully”. Would it be more appropriate to use “充分而全面” as the Chinese text for the phrase “fully and fairly” in the context of section 3(3)(b) of the above Rules? As you are aware, this is the more commonly adopted Chinese rendition for the phrase used in similar contexts in existing legislation. Please refer to regulation 4 of the Clubs (Safety of Premises) (Appeal Board) Regulations (Cap. 376 sub. leg. A), section 4 of the Residential Care Homes (Elderly Persons) (Appeal Board) Regulation (Cap. 459 sub. leg. B) and section 4 of the Environmental Impact Assessment (Appeal Board) Regulation (Cap. 499 sub. leg. A).

Sections 4 and 5

- (a) In sections 4(1)(a) and 5(b), does “copy of all documents” include copies of witness statements? If so, is it necessary to stipulate this clearly in the sections? As you are aware, in existing legislation relating to appeals, express reference is made to copies of witness statements (as distinguished from copies of documents) required to be served on parties to an appeal. Should the same approach be adopted in the above Rules?
- (b) In sections 4(1)(b) and 5(c), does “hearing of the appeal” refer to hearing of the appeal to receive oral representations? In section 13 of the principal Ordinance, reference is made to a hearing to receive oral representations instead of simply to a hearing of the appeal. Should the same reference be adopted in the above Rules for the sake of consistency?
- (c) In section 4(1), is the appellant required to apply to the Appeal Board for permission to serve the relevant documents beyond the specified time limit? If so, should section 4 be drafted in terms similar to section 5?
- (d) If the respondent fails to serve the relevant documents on the Appeal Board and the appellant as required under section 5, will there be any consequence? In the Environmental Impact Assessment (Appeal Board) Regulation where a similar requirement is imposed on the respondent to an appeal, there is a provision (i.e. section 14(2)) providing that where the Appeal Board is satisfied that the respondent has failed to comply with the requirement, the Appeal Board may allow the appeal. Should a similar provision be included in the above Rules?

Section 6

In section 6(1), is it intended that “hearing of the appeal” refers to “hearing of an appeal to receive oral representations”? If so, what procedure will be adopted in the event that the Appeal Board decides to consider and decide the appeal on the basis of written representations only under section 13(1) of the principal Ordinance? Should a separate provision be made in the above Rules to cater for the situation where the Appeal Board decides to consider the appeal without holding a hearing to receive oral representations?

Section 9

In section 9(1), should “abandon the appeal or any part of the appeal” be replaced by “abandon the whole or any part of the appeal” to make the Chinese and English texts match?

Section 11

Please clarify what is to be covered by the word “thing”? Is there any “thing” that is required to be served or lodged under the above Rules at all?

As the above Rules will be considered by the House Committee at its meeting on 22 February 2008, I would appreciate it if you could let me have the Administration's reply in both languages preferably on or before that date.

Yours sincerely,

(Connie FUNG)
Assistant Legal Adviser

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27 February 2008

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Dear Miss FUNG,

**Accreditation of Academic and Vocational Qualifications (Appeal)
Rules (L.N. 25 of 2008)**

Thank you for your letter of 20 February 2008.

Subsequent to our recent discussions on the captioned Appeal rules, I attach our reply to your enquiries at Annex for your consideration, please.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Thomas Wu'.

(Thomas Wu)

for Secretary for Education

Encl.

Section 2

The definition of “appellant” and “appeal” provided for in section 9 of the Accreditation of Academic and Vocational Qualifications Ordinance (the principal Ordinance) will be included in section 2 of the Appeal Rules.

Section 3

We have given further thoughts to the Chinese translation of “fully and fairly” and proposed that the term can be translated as “全面而中肯地”. The same wording has been used in other existing legislation. Please refer to section 28(2)(e) of the Urban Renewal Authority Ordinance (Cap. 563).

Sections 4 and 5

- (a) In sections 4(1)(a) and 5(b), “copy of all documents” should include witness statements, if in fact such statements have been taken. As it is not a requirement under the Appeal Rules that witness statements must be taken in all cases and that it is up to the appellant/respondent to provide copies of documents (including witness statements) to substantiate his or her justifications, it is not necessary to make express reference to “copies of witness statements” in the above Rules.
- (b) In the light of sections 12(1)(a) and 13 of the principal Ordinance, it is sufficiently clear that the phrase “hearing of the appeal” refers to a hearing to receive oral representations. It is not necessary to adopt the same reference in the Rules.
- (c) Agreed. Section 4(1) will be amended in terms similar to section 5.
- (d) It is to the respondent’s own disadvantage if he or she fails to provide the relevant documents specified under section 5 to justify the decision under appeal. Without the supporting documents to back up the respondent’s justifications, the Appeal Board may question the reasonableness of the original decision and may allow the appeal.

In our case, it is extremely unlikely that the respondent would fail to

serve the required documents on the Appeal Board and the appellant. The Hong Kong Council for Accreditation of Academic and Vocational Qualifications (HKCAAVQ), which is specified as the Accreditation Authority and the QR Authority under Schedule 1 to the principal Ordinance, will be the *only* respondent to the appeals. As HKCAAVQ is a statutory body responsible for accreditation of academic and vocational qualifications, we consider that the Council will surely provide the relevant documents to support its decision under appeal.

That said, the Appeal Board may rely on section 14(1)(a) of the principal Ordinance to handle the situation whereby the respondent fails to serve the relevant documents. According to the provision, for the purposes of an appeal, the Appeal Board may determine any matter of practice or procedure relating to the appeal where no provision governing such matter is made in the principal Ordinance or in any Appeal Rules made under the Ordinance.

In view of the above considerations, we believe that it is not necessary to include a provision similar to section 14(2) of the Environmental Impact Assessment (Appeal Board) Regulation.

Section 6

Section 13(2) of the principal Ordinance governs how the Appeal Board will consider an appeal. As this provision applies to *all* appeals (whether hearings are involved or not), it is not necessary to have a separate provision to cater for the situation where the Appeal Board decides to consider the appeal without holding a hearing.

Similar to the Appeal Board established under the principal Ordinance, there are other statutory appeal boards which may, with the consent of the parties to the appeal, determine the appeal without a hearing on the basis of written submissions only. It is noteworthy that under the governing legislations of these appeal boards, there are no provisions to govern the situation where the Appeal Board decides to consider the appeal without holding a hearing. (Please refer to section 21(g) of the Administrative Appeals Board Ordinance (Cap. 442) and section 12 of the Civil

Celebrant of Marriages Appointment Appeal Board Regulation (Cap. 181A))

Section 9

We think that the Chinese text -- “完全或局部放棄有關上訴” reflects accurately the meaning of the English text -- “abandon the appeal or any part of the appeal”. The same sentence structure has been used in other existing legislation. Please refer to section 17 of the Civil Celebrant of Marriages Appointment Appeal Board Regulation (Cap.181A).

Section 11

In order to be consistent with the wording used in section 14(1)(b)and (c) of the principal Ordinance, we propose to amend section 11 of the Appeal Rules to the effect that any document, statement, notice or article required to be served or lodged for the purposes of an appeal may be served or lodged in person or by post.

INTERPRETATION AND GENERAL CLAUSES ORDINANCE

RESOLUTION

(Under section 34(2) of the Interpretation and General Clauses Ordinance
(Cap. 1))

**ACCREDITATION OF ACADEMIC AND VOCATIONAL
QUALIFICATIONS (APPEAL) RULES**

RESOLVED that the Accreditation of Academic and Vocational Qualifications (Appeal) Rules, published in the Gazette as Legal Notice No. 25 of 2008 and laid on the table of the Legislative Council on 20 February 2008, be amended –

- (a) in section 2, by adding –
- ““appeal” (上訴) means an appeal under section 11 of the Ordinance;
- “appellant” (上訴人) means an operator, assessment agency or granting body lodging a notice of appeal under section 11 of the Ordinance;”.
- (b) in section 3(3)(b), in the Chinese text, by repealing “充分而不偏不倚” and substituting “全面而中肯”;
- (c) in section 4(1), by repealing “may specify” and substituting “may on application allow”;

- (d) in section 11, by repealing “notice or thing required to be served or lodged under these Rules” and substituting “statement, notice or article required to be served or lodged for the purposes of an appeal”.