

Accreditation of Academic and Vocational Qualifications Bill

Response to Issues Discussed at the Bills Committee Meeting on 1 February 2007

This paper sets out the Administration's response to the issues raised at the Bills Committee meeting held on 1 February 2007.

Notice of Appeal under new clause 11(2) in CSAs

2. At the Bills Committee meeting, the Administration was requested to provide samples of notice of appeal adopted by other appeal boards. A sample notice of appeal adopted by the Appeal Board of the Non-local Higher and Professional Education (Regulation) Ordinance (Cap. 493) is at Annex for Members' reference.

Members of Appeal Board under new clause 12 in CSAs

3. Members also enquired if the Bill should include a specific provision for the removal of Chairman or Deputy Chairman or panel members from the Appeal Board if the circumstances so warrant.

4. Section 42(a) of the Interpretation and General Clauses Ordinance (Cap. 1) states that where any Ordinance confers a power or imposes a duty upon any person to make any appointment, then the person having such power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment of, and to re-appoint or reinstate, any person appointed in exercise of such power or duty. As the appointment authority under the Bill, the Secretary for Education and Manpower (SEM) may resort to section 42(a) of Cap.1 to revoke the appointment of Chairman, Deputy Chairman or panel members if the circumstances so warrant. Thus, it is not necessary to include a specific provision.

Defence Provision under clause 13(4)(a)(iii)

Background of the CSA

5. Clause 13(4)(a) is specially provided for persons engaged in the publishing or advertising business¹. The existing clause 13(4)(a)(iii) specifies that it shall be a defence for such a person charged with an offence under clause 13(3) to prove that at the time of publication of the advertisement, he believed on reasonable grounds that all the information required by clause 13(1)(a) was contained in the advertisement and corresponded to the information contained in the relevant entry of a qualification in the Qualifications Register (QR), or that the relevant assessment agency was an appointed assessment agency. At the meeting held on 4 December 2006, Members commented that such requirement would put a heavy burden of proof on those engaging in the publishing or advertising business if they are charged with an offence.

6. In view of Members' concerns, we proposed at the Bills Committee Meeting held on 1 February 2007 to amend clause 13(4)(a)(iii) so that it shall be a defence for such a person charged with an offence under clause 13(3) if he proves that "he had no reason to believe that he would be committing an offence by publishing or causing to be published the advertisement". Members enquired how a person could prove that he had no reason to believe that he would be committing an offence.

Difference between the existing clause 13(4)(a)(iii) and the proposed CSA

7. Under the existing clause 13(4)(a)(iii), the relevant person charged with an offence can rely on the defence if he can demonstrate to the court that he believed on reasonable grounds that the advertisement contains all the information required in clause 13(1)(a) and corresponds with the relevant entry of qualification in the QR. To this end, the person may have to compare the information shown in the advertisement against the relevant information in the QR very carefully to ensure that the advertisement is legal, complete and accurate. People engaged in the publishing or advertising business might find these requirements too stringent and burdensome as they may not be familiar with the QF and the QR.

¹ According to clause 13(4)(a)(i)-(ii), the relevant person must prove that he carries on the business of publishing or arranging for the publication of advertisements; and he received the relevant advertisement for publication in the ordinary course of his business.

8. On the other hand, under the proposed CSA to clause 13(4)(a)(iii), it shall be a defence for the relevant person charged with an offence under clause 13(3) if he proves that "he had no reason to believe that he would be committing an offence by publishing or causing to be published the advertisement". To avail himself of the defence, the person charged only needs to prove that in dealing with the advertisement, he did not have any reason which caused him to believe that by publishing the advertisement he would be breaching the law. In other words, the person needs not take the specific steps prescribed in the existing clause 13(4)(a)(iii), other than the normal procedures a publisher/advertiser is expected to take, e.g., requiring the completion of an Order Form which includes terms and conditions that the advertiser should warrant that the advertisement submitted for publication does not contravene the laws of Hong Kong, or infringe the copyright or other intellectual property right of any third person, business or corporation.

9. It would therefore be easier for a person engaged in the publishing/advertising business to prove that "he had no reason to believe that he would be committing an offence", than to prove that he has reasonable grounds to believe that the information contained in the advertisement is complete and corresponds to that in the QR (as per the original clause 13(4)(a)(iii)).

10. A similar defence provision can be found in s.3(4)(a) of the Non-local Higher and Professional Education (Regulation) Rules (Cap. 493 sub. leg. B). The provision specifies that where a person is charged for contravention of the requirements in respect of an advertisement, it shall be a defence for such person to prove that he carried on the business of publishing or arranging for the publication of advertisements, that he received the advertisement for publication in the ordinary course of business, and that at the time he published the advertisement he had no reason to believe that the contravention would occur by reason of the publication of the advertisement.

Suggestion to amend clause 13(4)(a)(iii)

11. Regarding a Member's suggestion to amend clause 13(4)(a)(iii) to the effect that it shall be a defence for the person charged with an

offence if he proves that he had taken reasonable steps to prevent the commission of the offence, Members may wish to note that a similar provision has been provided for under clause 13(4)(b) of the Bill. It stipulates that it shall be a defence for the person charged to prove that he took all reasonable steps and exercised all due diligence to prevent the commission of the offence.

12. To avail himself of a defence under clause 13(4)(b), a defendant must prove that he has taken all reasonable steps (e.g. checking the information of the advertisement against that of the QR) and exercised all due diligence to prevent the commission of the offence; whereas under the proposed CSA to clause 13(4)(a)(iii), the defendant only needs to prove that he did not have any reason which caused him to believe there will be a breach of law in publishing/causing to publish an advertisement.

13. For those engaging in the publishing and advertising business, it is likely that they would rely on the defence provided for in clause 13(4)(a) as amended by the proposed CSA; while clause 13(4)(b) could be relied on as defence by those who are engaged in the provision of education and training services.

Education and Manpower Bureau
February 2007

FORM 9A

**NON-LOCAL HIGHER AND PROFESSIONAL EDUCATION
(REGULATION) ORDINANCE
(CHAPTER 493)**

NOTICE OF APPEAL UNDER THE ORDINANCE

Before completing this form, please read the notes below.

To: Chairman of the Non-local Higher and Professional Education Appeal Board

1. Full name of Appellant:

2. Address of Appellant:

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Telephone No.: Fax No.:

3. Address of Appellant or name and address of duly authorized representative if different from the above:

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4. Details of decision appealed against:

(Attach copy of decision and indicate the particular aspect being the subject of the appeal)

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Dated this day of 20

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Appellant.

Notes:

1. This form is to be used by a course operator who is dissatisfied with a decision of the Registrar under section 11, 12 or 15 of the Ordinance.
2. This form must be completed in accordance with the directions specified in the form and lodged with the Chairman of the Appeal Board at the Education and Manpower Bureau, Room 1150, Wu Chung House, 213 Queen's Road East, Wanchai, Hong Kong within 1 month after the date of notice given by the Registrar in respect of the decision you wish to appeal against.
3. At the same time that this notice is lodged you are required to serve a copy of the notice on the Registrar personally, or by registered post addressed to the last known address of the Registrar and to furnish to the Registrar and the Chairman a statement specifying the particulars of the appeal which you seek to establish, including such particulars of evidence to be adduced, documents to be produced, names of witnesses to be called and other circumstances as may suffice to ensure that the Appeal Board and the Registrar are fully and fairly informed of the grounds on which the appeal is based. You may also be required to furnish further particulars or produce documents for inspection by the Registrar.
4. You are advised to read the Non-local Higher and Professional Education (Regulation) Ordinance and Non-local Higher and Professional Education (Appeal Board) Rules before lodging this notice of appeal.