



中華人民共和國香港特別行政區政府總部食物及衛生局
Food and Health Bureau, Government Secretariat
The Government of the Hong Kong Special Administrative Region
The People's Republic of China

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Dear Ms KAN,

Medical Registration (Amendment) Bill 2016

I refer to your letter dated 15 March 2016. In response to your comments on the Medical Registration (Amendment) Bill, our reply is set out below.

Part I : Legal Issues

Article 142(3) of the Basic Law (BL)

BL142

2. Article 142(3) is not a stand-alone provision but an integral part of Article 142 of the Basic Law ("BL 142"). BL 142 reads as follows:

"The Government of the Hong Kong Special Administrative Region shall, on the basis of maintaining the previous systems concerning the professions, formulate provisions on its own for assessing the qualifications for practice in the various professions.

Persons with professional qualifications or qualifications for professional practice obtained prior to the establishment of the Hong Kong Special Administrative Region may retain their previous qualifications in accordance with the relevant regulations and codes of practice.

The Government of the Hong Kong Special Administrative Region shall continue to recognize the professions and the professional organizations recognized prior to the establishment of the Region, and these organizations may, on their own, assess and confer professional qualifications.

The Government of the Hong Kong Special Administrative Region may, as required by developments in society and in consultation with the parties concerned, recognize new professions and professional organizations."

3. BL 142 is a provision in Chapter VI of the Basic Law. Chapter VI deals with "education, science, culture, sports, religion, labour and social services". A salient feature of provisions in Chapter VI is that they concern matters which the HKSARG can "on its own" formulate relevant policies or practices "on the basis" of "the previous system".

Previous System

4. BL 142 is a general provision which applies to different "professions" and different "professional organizations" in Hong Kong. Prior to the reunification on 1 July 1997 and under the previous system in force then, numerous professions in Hong Kong were regulated by statute. These include accountants (see Professional Accountants Ordinance (Cap. 50)), dentists (see Dentists Registration Ordinance (Cap. 156)), lawyers (see Legal Practitioners Ordinance (Cap. 159) and medical practitioners (see Cap. 161), etc. Under these statutes, each profession is self-regulating to a varying degree.

5. In view of the previous system of regulation of "professions" in Hong Kong, it cannot be the intention of BL 142(3) to confer complete autonomy on "professional organizations" or otherwise change the previous system of regulation of "professions" or "professional organizations". Bearing in mind the theme of continuity in the application of the Basic Law (see *Hong Kong Special Administrative Region v. Ma Wai Kwan* [1997] HKLRD 761),

there are sound and compelling reasons that BL 142 would not intend to alter the previous system of governance of "professions" in Hong Kong. Indeed, BL 142(1) requires the HKSARG to formulate provisions for assessing professional qualifications on the basis of the previous system. BL 142(3) would not intend to confer complete autonomy to "professional organizations" where no such autonomy existed under the previous system. As noted by Professor Ghai, the provision of BL 142 does not go so far as to state that membership of a profession shall be determined by a professional organization, nor does it specify the degree of autonomy of the profession or professional organizations. (Ghai, Y., *Hong Kong's New Constitutional Order* (2nd Edn), Hong Kong University Press, 1999, pp. 332, 426, 436.)

6. One prominent feature of the composition of the Medical Council of Hong Kong ("MCHK") under the previous system is the presence of both Government appointed members (including lay members) and elected members. Tracing the legislative history of the Medical Registration Ordinance, it is noted that elected members were only introduced in 1996 when the Medical Registration (Amendment) Ordinance was enacted. The composition of MCHK has been evolving in its history in response to community interests and increasing workload. Further, the previous system on the regulation of medical practitioners was a system based on statute. It is clear that the self-regulation of the profession of medical practitioners in Hong Kong has always been subject to statutory oversight and the composition of the Council has been updated in its history to meet new challenges.

7. There were both appointed and elected members including appointed lay council members in the composition of MCHK under the previous system. In view of the legislative history and evolvement of the composition of MCHK, the Administration is of the view that BL 142 does not intend to prohibit appointed members including appointed lay members in the membership of MCHK. Appointed members including appointed lay members are part of the composition of MCHK both before and after the reunification.

8. As noted by Professor Ghai, BL 142(3) does not specify the degree of autonomy of the profession or professional organizations. Reading the provisions of BL 142 as a whole, it is arguable that BL 142 does not prohibit the HKSARG from making changes to the composition of MCHK by legislative amendments. The Government was able to introduce such changes under the previous system.

9. On the basis of the above discussion, the Administration is of the view that the proposal under the Medical Registration (Amendment) Bill to increase the number of lay members appointed by the Chief Executive from four to eight is not inconsistent with BL 142(3) and would not be prohibited by the BL provision. The proposal can ease the heavy workload of the Council and is based on the previous system.

Clause 10 of and Part 1 of Schedule 1 to the Bill

10. In November 2012, the Court of Appeal (“CA”)¹ affirmed that Members who had taken part in the disciplinary proceedings (either during preliminary investigation or in the disciplinary inquiry) involving matters which subsequently formed the factual basis of the recommendation of the Education and Accreditation Committee (“EAC”) should not take part in the Council’s decision on the recommendation (including the appeal under section 20O of the Medical Registration Ordinance (“MRO”)), for the reason that such Members would have already formed a view on the underlying facts and therefore have been tainted with apparent bias.²

11. As advised by the Legal Adviser to MCHK, according to the above ruling and by way of analogy, overlapping membership among the different proceedings of the Medical Council and its Committees relating to the same underlying facts is prohibited. MCHK has adhered to this principle strictly so that a member who has been involved in a particular stage of proceedings will not be involved in the subsequent proceedings relating to the same underlying facts. As such, a member of the Health Committee or the EAC who has been involved in certain proceedings must not attend a meeting of the Council whilst it is inquiring into a case relating to the same underlying facts.

12. Under the existing legislation, a lay assessor may participate in an inquiry meeting. Under the Bill, assessors who are lay persons may be appointed to the Preliminary Investigation Committee (“PIC”). Following the existing arrangement of “tainted” members, a lay assessor who has been involved in a PIC shall not participate in the subsequent proceedings for the same case. As medical assessors will not be appointed to a PIC, there is no need to apply this rule to them.

¹ CACV 205, 206 /2011, CACV 209 /2011

² Paragraphs 63 to 80 of the CA’s judgment are relevant.

Part II: Drafting Issue

Clause 10 and Part 1 of Schedule 1

13. S.21(4C) of Cap. 161 was added to the Ordinance by s.26 of the Medical Registration (Amendment) Ordinance (No. 7 of 1996). The source text shows "the Council" (attached). Thus, we will rectify "the council" in the Loose-leaf Edition.

Yours sincerely,



(Natalie LAU)
for Secretary for Food and Health

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Clerk to Bills Committee
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