

Bills Committee on Private Columbaria Bill

**Supplementary Information Requested by Members
at the meeting on 3 February 2017**

At the Bills Committee meeting on 3 February 2017, Members asked the Government to provide supplementary information on a number of issues. The requested information is provided in the ensuing paragraphs.

(A) Use of the phrase “終局決定”

2. Clause 84(12) of the Bill provides that “[t]he decision of an Appeal Board on any appeal is final” (in Chinese, “上訴委員會對上訴的決定，屬終局決定。”).

3. A Member asked the Government to provide examples on the use of the phrase “終局決定” in legislation concerning other appeal boards. Some examples are provided below –

- (a) section 23(4) of Schedule 1A to the Immigration Ordinance (Cap. 115) concerning the Torture Claims Appeal Board, which provides that –

“The Appeal Board’s decision is final.”

“上訴委員會的決定屬終局決定。”

- (b) section 122 of the Lifts and Escalators Ordinance (Cap. 618), which provides that –

“Subject to subsection (2), a decision of an appeal board is final and is not subject to further appeal.”

“除第(2)款另有規定外，上訴委員會的決定屬終局決定，不得對之提出進一步的上訴。”

- (c) section 38(2) of the Property Management Services Ordinance (Cap. 626), which provides that –

“The decision of the tribunal is final.”

“上訴審裁小組所作的決定，屬終局決定。”

(B) Arrangements set out in clause 84(6) to (8) of the Bill

4. Clause 84(6) to (8) of the Bill stipulates how the advice from the legal adviser of the Private Columbaria Appeal Board (“Appeal Board”) on a legal matter relating to an appeal should be handled –

- (a) clause 84(6) provides that the legal adviser must advise the Appeal Board on legal matters relating to an appeal in the presence of every party to the appeal;
- (b) clause 84(7) provides that every party to the appeal must be informed of the advice if it is tendered after the Appeal Board has commenced to deliberate on its findings; and
- (c) clause 84(8) provides that every party to the appeal must be informed of, if applicable, the fact that the Appeal Board does not accept the advice of the legal adviser.

5. A Member asked the Government to provide examples of appeal boards which had adopted arrangements similar to those set out in clause 84(6) to (8). Some examples are provided below –

- (a) section 8 of the Medical Registration (Miscellaneous Provisions) Regulation (Cap. 161 sub. leg. D), which provides that –

“(1) When the Legal Adviser to the Council advises the Council on any question of law as to evidence, procedure or any other matter, in any inquiry under section 21 of the Ordinance, an appeal hearing from a decision of a committee or a meeting of the Council pursuant to an election petition under the Medical

Practitioners (Electoral Provisions) (Procedure) Regulation (Cap 161 sub. leg. B), he shall do so in the presence of every party to the proceedings or the person representing each party or, if the advice is tendered after the Council has commenced to deliberate as to its findings, every such party or person as aforesaid shall be informed of the advice that the Legal Adviser has tendered.

(2) *In any case where the Council does not accept the advice of the Legal Adviser to the Council on any such question mentioned in subsection (1), every such party or person shall be informed of this fact.”*

(b) section 7 of the Midwives Registration (Miscellaneous Provisions) Regulation (Cap. 162 sub. leg. D), which provides that –

“(1) If, during an inquiry held under section 8 or 10 of the Ordinance, the legal adviser to the Council advises the Council on any question of law as to evidence, procedure or any other matter, the legal adviser shall give the advice in the presence of every party to the proceedings or in the presence of the person representing each of the parties.

(2) *If, after the Council has commenced to deliberate as to its findings, the legal adviser gives any advice on any question of law as to evidence, procedure or any other matter in respect of an inquiry under section 8 or 10 of the Ordinance, the legal adviser shall inform all parties to the proceedings or their representatives of his advice.*

(3) *If the Council does not accept any of the advice given by the legal adviser under subsection (1) or (2), the legal adviser shall inform the parties to the proceedings or their representatives accordingly.”*

- (c) section 40 of the Chiropractors (Registration and Disciplinary Procedure) Rules (Cap. 428 sub. leg. B), which provides that –

- “(1) Where during the hearing of an inquiry under section 17 of the Ordinance, the Legal Adviser advises the Inquiry Committee on any question of law as to evidence, procedure or any other matter in respect of the inquiry, the Legal Adviser shall, as far as practicable, do so in the presence of the parties to the inquiry or their legal representatives. Where it is impracticable to do so, the chairman of the Inquiry Committee shall cause the parties to the inquiry or their legal representatives to be informed of the advice.*
- (2) If an advice of the Legal Adviser is tendered after the Inquiry Committee has commenced to deliberate as to its findings, the chairman of the Inquiry Committee shall cause the parties to the inquiry or their legal representatives to be informed of the advice.*
- (3) In the case of the Inquiry Committee not accepting the Legal Adviser's advice mentioned in subsection (1) or (2), the chairman of the Inquiry Committee shall cause all parties to the inquiry or their legal representatives to be informed of this fact.”*

6. In fact, in a recent Court of Final Appeal case *Medical Council of Hong Kong v. Helen Chan* [2010] 3 HKLRD 667, the practice of the Medical Council to inform the parties in open hearing of the advice given by the legal adviser to the Council has been mentioned in the case, without objection from the Court (see paragraphs 37-40 of the judgment). Specifically at paragraph 40 of the judgment, Mr Justice Bokhary PJ made the following comment on the case *Lam Kwok Pun v. Dental Council of Hong Kong* [2000] 4 HKC 181 –

“The Court of Appeal’s concern in that case was not mainly with the fact that the legal adviser had been present at the tribunal’s deliberations. It was mainly with the fact that she had advised the

tribunal in private so that the dentist's counsel had no opportunity to address the tribunal on the accuracy or otherwise of such advice. As it turned out, the advice was in error. And it was for such error that the dentist's appeal was allowed."

(C) Background of proposing appointment of a legal adviser to the Private Columbaria Appeal Board

7. A Member noted that clause 81(3) (read with clause 80) of the Bill required the Chairperson and Deputy Chairpersons of the Appeal Board to be qualified for appointment as a District Judge under section 5 of the District Court Ordinance (Cap. 336) (to be referred to as "legally qualified"), and the Member enquired the background of the need to appoint a legal adviser to the Appeal Board.

8. It is common for the Chairperson or Deputy (or Vice) Chairperson of an appeal board to serve as the presiding officer to hear an appeal. There are examples of statutory appeal boards and tribunals in Hong Kong for which the Chairperson and Deputy (or Vice) Chairpersons are required to be legally qualified.¹

9. Similar to many other appeal boards and tribunals, the Private Columbaria Appeal Board is a quasi-judicial body. The Chairperson and Deputy Chairperson are required to preside at the hearing of an appeal. The presiding officer may be called upon to determine a question of law in an appeal and should steer the proceeding and deliberation in such a way as to be able to withstand legal challenges. Hence, it is vital for him/her to be equipped with the necessary legal expertise and experience and of the right calibre to perform such roles.

10. There are examples of statutory appeal boards in Hong Kong where the Chairman has to be legally qualified and a legal adviser may be appointed

¹ These include, for instance –

- (a) the Municipal Services Appeals Board (see section 6(6) of the Municipal Services Appeals Board Ordinance (Cap. 220)); and
- (b) the Buildings Appeal Tribunal (see section 48(2) of the Buildings Ordinance (Cap. 123)).

to advise the appeal board.²

11. Normally, a legal adviser assumes an advisory role and provides advice on legal matters to the appeal board or tribunal. In the Court of Appeal case *Longstaff v. Medical Council of Hong Kong* [1980] HKLR 858, Huggins VP made the following comment at p.865 –

“Primarily the legal adviser’s duty is to tender advice when asked. In addition he must not allow the Council to be misled and, if a party advances a submission which is bad in law or if he becomes aware that the Council in the course of their deliberations are misdirecting themselves, it is his duty of his own motion to put matters right.”

12. We consider the appointment of a legal adviser to advise the Private Columbaria Appeal Board on legal matters relating to an appeal is in the interest of upholding the competence, independence and impartiality of the Appeal Board, which are qualities which the process of courts and tribunals must have in order for justice to be done, especially when it is anticipated that the legal issues involved could be quite diversified and complicated. It would also be desirable to have a legal adviser offering consistent advice across all appeals heard by Appeal Boards under different presiding officers, who may be the Chairperson, Deputy Chairpersons or Members who are legally qualified, as on occasion some may be precluded from acting as a presiding officer at an appeal hearing if he/she has a direct or indirect interest in the appeal.

Food and Health Bureau February 2017

² These include, for instance –

- (a) the Municipal Services Appeals Board (see sections 6(1)(a) and 12(3) of the Municipal Services Appeals Board Ordinance (Cap. 220)); and
- (b) the Entertainment Special Effects Appeal Board (see sections 35(1) and 40(3) of the Entertainment Special Effects Ordinance (Cap 560)).