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By Fax (2840 0467)

7 September 2017

Miss Natalie LAU  
AS for Food & Health (Health)8  
Food and Health Bureau  
19/F, East Wing  
Central Government Offices  
2 Tim Mei Avenue, Tamar  
Hong Kong

Dear Miss LAU,

**Medical Registration (Amendment) Bill 2017 ("the Bill")**

We are scrutinizing the legal and drafting aspects of the Bill.

Please find attached two schedules listing our observations on the legal and drafting aspects of the English text of the Bill. We would be grateful if you could let us have your response in bilingual form as soon as possible.

Yours sincerely,

(Wendy KAN)  
Assistant Legal Adviser

c.c. DoJ (Attn: Miss Cindy CHEUK, SGC) (By Fax: 3918 4613)  
Clerk to Bills Committee  
LA  
SALA3

## **Schedule 1: Legal Issues**

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

1. We refer to our letter dated 15 March 2016 (a copy of which is at Appendix I) and the Administration's reply dated 18 March 2016 (a copy of which is at Appendix II) in relation to the question on how the proposals under the Medical Registration (Amendment) Bill 2016 regarding the membership of the Medical Council of Hong Kong ("the Medical Council") and its committees were in compliance with Article 142(3) of BL. As the Bill has modified such proposals, please let us know if the Administration has any further or revised response to such question in respect of the modified proposals.

### Clause 1(3) of the Bill

2. The proposed new section 3(5AAB) of the Medical Registration Ordinance (Cap. 161) provides for the term of office of a member elected or appointed to fill a vacancy under the proposed new section 3(5AA) of Cap. 161. Under clause 1(3)(a) of the Bill, the proposed new section 3(5AA) of Cap. 161 comes into operation on a day to be appointed by the Secretary for Food and Health ("SFH"). Should the proposed new section 3(5AAB) of Cap. 161 also come into operation on a day to be appointed by SFH?
3. Pursuant to clause 1(3)(b) of the Bill, the proposed amendment to be made to section 3(7) of Cap. 161 by virtue of clause 4(25) of the Bill comes into operation on a day to be appointed by SFH in so far as it relates to the proposed new section 3(2)(ga) of Cap. 161. Such proposed amendment, however, does not relate to the proposed new section 3(2)(ga) of Cap. 161. Should clause 4(25) of the Bill as referred to in clause 1(3)(b) of the Bill rather be clause 4(27) of the Bill? Under clause 4(27) of the Bill, a proposed new section 3(9) of Cap. 161 is to be added which relates to, among other things, section 3(2)(ga) of Cap. 161.

### Clause 4 of the Bill

4. Please clarify, with respect to the proposed section 3(2)(h) of Cap. 161, whether the Hong Kong Academy of Medicine Ordinance (Cap. 419) would be amended to provide for the procedures and

other matters in relation to the election of the two registered medical practitioners by the Hong Kong Academy of Medicine as members of the Medical Council.

5. Under the proposed section 3(3) of Cap. 161, a member of the Medical Council appointed by the Chief Executive ("CE") (i.e. under section 3(2)(c), (d), (da), (db) or (g) of Cap. 161) holds office for three years from the date of his or her appointment. However, a non-CE appointed member of the Medical Council (i.e. elected or nominated under the proposed new section, proposed section or section 3(2)(ga), (gb), (h), (i) or (j) of Cap. 161), holds office for three years from the date of notification in the Gazette of his or her election or nomination under the proposed new section or proposed section 3(3AA), (3AAB), (3AAC) or (3A) of Cap. 161. Please explain the reason(s) for prescribing different sets of rule on the time for commencement of office of a CE appointed member and a non-CE appointed member of the Medical Council.
6. Under section 3(5) of Cap. 161, if a member of the Medical Council appointed by CE resigns or the office becomes vacant before the expiry of the term of office, CE may, but not must, appoint a person to fill such vacancy in accordance with the section. On the contrary, filling of a vacancy where a non-CE appointed member of the Medical Council resigns or the office becomes vacant must be proceeded with under the proposed new section or section 3(5AA), (5AAC), (5AAE), (5A) or 3(5B) of Cap. 161. Please clarify the ground(s) for adopting different policies for filling such vacancies in respect of the seats of a CE-appointed member and a non-CE appointed member of the Medical Council.
7. Please clarify the time upon which a person appointed by CE to fill a vacancy arising from a resignation of a member or otherwise before the expiry of the member's term of office as provided in section 3(5) of Cap. 161 starts to hold office, as the section does not provide so.
8. It is noted that pursuant to the proposed new section or proposed section 3(5AAB), (5AAD), (5AAF), (5A) or (5B) of Cap. 161, a person elected, appointed or nominated to fill a vacancy which arises from a resignation of a member or otherwise before the expiry of the member's term of office as stated in the proposed new section or proposed section 3(5AA), (5AAC), (5AAE), (5A) or (5B) of Cap. 161 holds office from the date of election, appointment or nomination. In the case of an ordinary election or nomination

under the proposed new section or proposed section 3(3AA), (3AAB), (3AAC) or (3A) of Cap. 161, however, the relevant member holds office from the date of notification in the Gazette of the member's election or nomination. Please provide the reason(s) for the difference in the policy approach.

9. With respect to the proposed new section 3(9) of Cap. 161:
  - (a) please clarify whether it is the policy intention that the Secretary of the Medical Council ("the Secretary") is required, after a person is elected or nominated to fill a vacancy mentioned in the proposed new section or proposed section 3(5AA)(a), (5AAC), (5AAE) or (5A) of Cap. 161, or after a person is appointed by the Medical Council as its member pursuant to the proposed new section 3(5AA)(b) of Cap. 161, to publish a notification in the Gazette of the person's election, nomination or appointment. If so, please consider to amend the proposed new section 3(9) of Cap. 161 to reflect such policy intention;
  - (b) please consider to extend the application of the section in respect of members appointed by CE under section or proposed section 3(2)(c), (d), (da), (db), (g) or (3) of Cap. 161; and
  - (c) it appears that the section does not apply to an appointment of a temporary member of the Medical Council pursuant to the proposed section 3C of Cap. 161. Please explain the reason(s) for such arrangement.

#### Clauses 4, 12, 13 and 35 of the Bill

10. Please elucidate the reason(s) for providing different eligibility requirements in respect of the provisions listed below regarding an order made under the proposed section 21A of Cap. 161:
  - (a) the Medical Council must not, pursuant to the proposed section 20BA(4) of Cap. 161, appoint to a committee a registered medical practitioner in respect of whom an order has been made under the proposed section 21A of Cap. 161 at any time;
  - (b) a committee of the Medical Council must not, under the proposed section 20BA(11) of Cap. 161, appoint to a

sub-committee a registered medical practitioner in respect of whom an order has been made under the proposed section 21A of Cap. 161 at any time;

- (c) the Medical Council may not, by virtue of the proposed new section 20BC(5)(b) of Cap. 161, appoint a registered medical practitioner as a medical assessor if an order has been made under the proposed section 21A of Cap. 161 in respect of the practitioner at any time;
- (d) a registered medical practitioner in respect of whom an order has been made under the proposed section 21A of Cap. 161 at any time is still eligible for nomination, re-nomination, appointment, reappointment, election or re-election, as a member of the Medical Council under the proposed section 3(7) of Cap. 161; and
- (e) if a registered medical practitioner is the subject of an order made under the proposed section 21A of Cap. 161, the practitioner is, pursuant to the proposed section 4(2)(a) of the Medical Practitioners (Electoral Provisions) (Procedure) Regulation (Cap. 161B), disqualified from being nominated in an election under the proposed section 3(2)(j) of Cap. 161.

#### Clause 7(1) of the Bill

11. The proposed section 4(2A) of Cap. 161 provides that at a meeting of the Medical Council for an election petition under Cap. 161B or an appeal hearing under section 20F, 20O, or 20W, the quorum is five members. However, under section 37(1) of Cap. 161B and sections 43(4), 47(1) and 49(1) of the Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap. 161E), the quorum for the hearing of an election petition or appeal hearing is five members, including the chairman of the Medical Council ("the MC Chairman"). Please clarify the policy intention of these quorum requirements and consider to make necessary amendment(s).

#### Clause 13 of the Bill

12. Under the proposed new section 20BB(5) or 20BC(5) of Cap. 161, the Medical Council may not appoint a person as a lay assessor or a medical assessor if the prescribed conditions are met. Please

clarify whether or not it is the policy intention to allow discretion to be exercised by the Medical Council under those sections. In this regard, please note the words "must not" are used in the proposed section 20BA(4) or (11) of Cap. 161 and the requirement under the proposed section 20BA(4) of Cap. 161 that the Medical Council must not appoint to a committee a person in respect of whom an order has been made under the proposed section 21 or 21A of Cap. 161 at any time, including appointing a person who is a medical assessor to a Preliminary Investigation Committee ("PIC").

#### Clause 16 of the Bill

13. Under the proposed new section 20I(2) of Cap. 161, the Education and Accreditation Committee ("EAC") is required to act in accordance with the regulations made under the proposed section 33 of Cap. 161. Please explain the reason(s) for not imposing such a duty on the Licentiate Committee ("LC") and the Ethics Committee ("EC").

#### Clauses 16, 18 and 20 of the Bill

14. Under the proposed section 20S(5)(b) of Cap. 161, a member of PIC is eligible for reappointment for a further period or periods not exceeding 12 months each on the expiry of the member's period of appointment or reappointment. Please clarify whether:
  - (a) a member who is not a public officer of LC or EAC is eligible for further periods of reappointment after the first reappointment, as sections 20C and 20H of Cap. 161 do not expressly provide so; and
  - (b) a member of EC or the Health Committee ("HC") is eligible for reappointment on the expiry of the member's period of appointment, given that section 20P and the proposed section 20U of Cap. 161 do not provide so.

In this respect, please note the requirement under paragraph 2(1) of the proposed Schedule 2 to Cap. 161 that a member of a committee established under Cap. 161 is eligible for re-election or reappointment, depending on the nature of this membership of the committee.

Clauses 18(5) and 49 of the Bill

15. The proposed section 20S(4) of Cap. 161 provides that if both the chairman and the deputy chairman of the PIC concerned could not preside at the meeting of PIC after declaration of their interest, the other members present and who form a quorum must elect a person from among themselves to preside at the meeting. Should any of these other members present be excluded from forming a quorum of, electing other member to preside or presiding at, such a meeting if he or she has declared his or her interest in a case which has been referred to the PIC concerned? If so, should the proposed section 20S(4) of Cap. 161, and section 7(3)(c) and (4) of Cap. 161E be amended to reflect that?

Clause 22 of the Bill

16. Under the proposed new section 20X(4) of Cap. 161, if, before the proceedings of an inquiry panel are concluded, a vacancy occurs in the membership of the panel because of the death, resignation or otherwise of a member, the Medical Council must, as soon as possible, appoint another inquiry panel to hold a new inquiry. In such an event, if substantial legal costs have already been incurred by the complainant or the registered medical practitioner concerned in those proceedings, would they be entitled to seek any kinds of relief in respect of the legal costs so incurred?

Clause 23 of the Bill

17. As reflected in the proposed section 21(4B) of Cap. 161, an inquiry panel may make a decision or an order in an inquiry under the proposed section 21(1) of Cap. 161. Please clarify the items under the proposed section 21(1) of Cap. 161 that are orders and those that are decisions. It is noted that the requirements under the proposed new section 21(1A) and section 21(5) and (6) of Cap. 161 only apply to an order, but not a decision, made by an inquiry panel. Further, pursuant to the proposed new section 26(1A) of Cap. 161, a registered medical practitioner may appeal to the Court of Appeal ("CA") in respect of an order, but not a decision, made by an inquiry panel in respect of him or her under the proposed section 21 of Cap. 161.
18. Please provide the reason(s) for proposing to delete section 21(4) of Cap. 161.

19. Please clarify the ground(s) for not providing in the proposed new section 21(4CA) of Cap. 161 that the section does not apply if, when the vacancy occurs because of the circumstances mentioned in that section, the inquiry panel concerned has determined its decision on the review but such decision has not yet been announced, as similar to the proposed new section 20X(5) of Cap. 161. Please also note the observation in Question 16 where another inquiry panel is appointed under the proposed new section 21(4CA) of Cap. 161.
20. Please explain the reason(s) for not providing in section 21(5)(b) of Cap. 161 the publication in the Gazette of the order made under section 21(1)(v) of Cap. 161 as varied on appeal.

Clauses 23, 24 and 29 of the Bill

21. Please clarify whether:
  - (a) the application of the proposed section 21(1)(iv) and (iva) is mutually exclusive and the reason(s) for including the reference to the proposed section 21(1)(iv) of Cap. 161 in section 21(5A) of Cap. 161;
  - (b) the application of the proposed section 21A(1)(c) and section 21A(1)(d) of Cap. 161 is mutually exclusive and the reason(s) for including the reference to the proposed section 21A(1)(c) of Cap. 161 in section 21(3) of Cap. 161;
  - (c) with respect to the phrase "an order under section 21(1)(iva) is made at the same time as another order is made under section 21(1)" in the proposed section 25(2) of Cap. 161, "another order" includes an order made in the proposed section 21(1)(iv) of Cap. 161; and
  - (d) with respect to the phrase "an order under section 21A(1)(d) is made at the same time as another order is made under section 21A(1)" in the proposed section 25(2) of Cap. 161, "another order" includes an order made in the proposed section 21A(1)(c) of Cap. 161.

Clause 28 of the Bill

22. Please explain the scope of assistance that a registered medical practitioner is entitled to be offered by counsel or by a solicitor at a



hearing by HC under the proposed section 24(2) of Cap. 161, such as seeking legal advice during the hearing. It appears that the proposed scope does not cover representation by counsel or by a solicitor throughout the hearing, as in an inquiry under the proposed section 21 of Cap. 161.

Clause 29 of the Bill

23. Please confirm whether an application for the restoration of a registered medical practitioner's name to the General Register pursuant to section 25(3) of Cap. 161 will operate to include an application for the restoration of his or her name to the Specialist Register if his or her name is also included in the Specialist Register. What if a registered medical practitioner only wishes to apply for the restoration of his or her name to the Specialist Register because his or her name has not been removed from the General Register?

Clause 30 of the Bill

24. Given that the service of an order under section 21(1)(v) of Cap. 161 is contained in the proposed section 25(1A) of Cap. 161, should "or (1A)" be added after "section 25(1)" in the proposed section 26(3) of Cap. 161?
25. Under the proposed new section 26(1A)(b) of Cap. 161, if a registered medical practitioner appeals to CA on an order made in respect of him or her by an inquiry panel ("the Original IP") under the proposed section 21 of Cap. 161, CA may remit the case either to the Original IP to hold a new inquiry or to the Medical Council for appointing another inquiry panel ("the Other IP") to hold a new inquiry. At the new inquiry held as a result of CA's remittance of the case, the proposed new section 26(6) of Cap. 161 provides that the validity of the proceedings before the inquiry panel concerned (i.e. the Original IP or the Other IP) is not to be called into question only because a member of the inquiry panel concerned who was present at the former inquiry is not present at the current inquiry ("Subsection 6(a) Scenario") or a member of the inquiry panel concerned who is present at the current inquiry was not present at the former inquiry ("Subsection 6(b) Scenario").

Given that all the members of an inquiry panel must be present throughout the inquiry proceedings pursuant to the proposed new section 20X of Cap. 161, in the case of the Original IP which

conducts the new inquiry, Subsection 6(a) Scenario and Subsection 6(b) Scenario would not occur. In the case of the Other IP which conducts the new inquiry, Subsection 6(a) Scenario would not occur. Please clarify the policy intention of providing the proposed new section 26(6) of Cap. 161.

Clause 31 of the Bill

26. Section 33(4)(a)(ix) of Cap. 161 empowers the Medical Council to make regulation to provide for, among other things, references of cases by HC. Under the proposed regime of the Bill, no references of cases would be made by HC. Please consider to amend the section.

Clause 32 of the Bill

27. The proposed new Schedule 6 to Cap. 161 contains the transitional and savings provisions for the Bill, if passed. Please explain the need to confer SFH, under the proposed new section 36(2) of Cap. 161, with the power to amend the proposed new Schedule 6 by notice published in the Gazette.

Clause 34 of the Bill

*Proposed new Schedule 5 to Cap. 161*

28. Please provide the ground(s) for electing the authorities set out in items 1 to 5 of Table 1, and the authorities set out in items 6 to 8 of Table 2, of the proposed new Schedule 5 to Cap. 161 for nominating lay assessors and medical assessors respectively.

*Proposed new Schedule 6 to Cap. 161*

29. Please consider whether the scope of the proposed new section 5(2)(a) of the proposed new Schedule 6 to Cap. 161 should be expanded to provide for transitional and savings arrangements for a case where the chairman or the deputy chairman of PIC ("the Former PIC") as established prior to the commencement ("the Commencement") of the Bill, if passed, under clause 1(2) of the Bill (i.e. the commencement of the majority of its provisions upon its gazettal) has directed the case be proceeded under section 10, instead of section 9(1), of Cap. 161E prior to the Commencement.

30. In the proposed new section 5(5) of the proposed new Schedule 6 to Cap. 161:
- (a) should the proposed new section 20S(2A) of Cap. 161 be excluded from application as well pursuant to the proposed new section 5(5) of the proposed new Schedule 6, as the matters contained in the proposed new section 20S(2A) are already prescribed in the current section 20S(2) of Cap. 161?
  - (b) please also consider whether, as a matter of policy, the proposed section 20BA(5) of Cap. 161 should also be excluded from application in accordance with the proposed new section 5(5) of the proposed new Schedule 6. Pursuant to the current section 20BA(5) of Cap. 161, the chairman of the Former PIC must be a member of the Medical Council and that the chairman would continue to act in such capacity on and after the Commencement by virtue of the proposed new section 5(3)(c) of the proposed new Schedule 6. If so, the current section 20BA(5) of Cap. 161 should be added in the proposed new section 5(8) of the proposed new Schedule 6.
31. It is noted that the proposed new section 6 of the proposed new Schedule 6 to Cap. 161 contains transitional and savings arrangements regarding ongoing inquiries by the Medical Council under the current section 21 of Cap. 161 commenced prior to the Commencement. If the conditions set out in the proposed new section 6(1) of the proposed new Schedule 6 are met, the members of the Medical Council and, if applicable, assessors who have been conducting the inquiry concerned before the Commencement may continue to conduct it on and after the Commencement as an inquiry panel as if they were appointed to an inquiry panel under the proposed new section 20X of Cap. 161 ("the Deemed Panel").
- (a) Please explain the reason(s) for not providing transitional and savings arrangements for cases which have been referred to the Medical Council by HC or EAC for inquiries under section 21 of Cap. 161 prior to the Commencement.
  - (b) Please consider whether the scope of the proposed new section 6(1) of the proposed new Schedule 6 should be expanded to deal with:

- (i) cases where the Former PIC has referred to the Medical Council for inquiries under the current section 21 of Cap. 161 but prior to the Commencement, no meetings of the Medical Council have been held; and
  - (ii) cases directed by the MC Chairman to be proceeded in accordance with section 16(1) of Cap. 161E before the Commencement.
- (c) With respect to the proposed new section 6(1)(b) of the proposed new Schedule 6, please clarify whether the proposed new section 6 of the proposed new Schedule 6 applies if, subject to fulfilling all other prescribed conditions, more than one meeting of the Medical Council has been held in accordance with section 21B of Cap. 161 prior to the Commencement. If so, please explain who is to be chairman of the Deemed Panel under the proposed new section 6(2)(b) of the proposed new Schedule 6 if different persons have performed the function of the president of those meetings of the Medical Council.
- (d) Please consider whether the proposed new section 20BD(1)(a) of Cap. 161 should be excluded from application as provided for in the proposed new section 6(3) of the proposed new Schedule 6. The proposed new sections 3 and 4 of the proposed new Schedule 6 to Cap. 161 already make provision for the terms of offices of the assessors concerned.
32. Please consider whether further transitional and saving provisions should be added to deal with the following matters:
- (a) review, after the Commencement, of decisions or orders made by the Medical Council in inquiries under section 21(1) of Cap. 161 before the Commencement pursuant to the proposed section 21(4B) of Cap. 161;
  - (b) the application of section 21(5), (5A) and (6) and the proposed section 25 of Cap. 161 after the Commencement in respect of orders made by the Medical Council under section 21(1) of Cap. 161 before the Commencement;
  - (c) cases that have been referred to HC, either by the Former PIC under section 11(8) of Cap. 161E or by both the chairman and

the deputy chairman of the Former PIC under section 6(4) of Cap. 161E prior to the Commencement but the chairman of the Former PIC has not yet notified the chairman of HC in accordance with section 14(1) of Cap. 161E or the Former PIC or its chairman has not yet directed the Secretary in accordance with section 14(2) of Cap. 161E prior to the Commencement. The Former PIC would not be preserved under the proposed new section 5 of the proposed new Schedule 6 to Cap. 161 due to the operation of the proposed new section 5(1) and (2) of the proposed new Schedule 6;

- (d) in respect of cases that have been referred to the Medical Council for inquiries by the Former PIC prior to the Commencement, reference of the cases back to the Former PIC under the proposed new section 20Y(b) of Cap. 161 and the proposed section 15(1)(a) of Cap. 161E as mentioned in the proposed new section 6(4)(d) of the proposed new Schedule 6 to Cap. 161. It is noted that the Former PIC should have already completed the relevant work and accordingly the Former PIC would not be preserved by the proposed new section 5 of the proposed new Schedule 6; and
  - (e) for cases remitted by CA under section 26(1) of Cap. 161 to the Medical Council for inquiries under section 21(1) of Cap. 161 before the Commencement and such inquiries have not been completed before the Commencement.
33. With respect to the proposed new section 7 of the proposed new Schedule 6 to Cap. 161, if after the appeal referred to in the section has been made after the Commencement and subsequently CA decides to remit the case under the proposed new section 26(1A)(b)(i) of Cap. 161 for holding a new inquiry, please clarify which entity or panel is to hold the new inquiry.

#### Clause 39 of the Bill

34. Under the proposed section 24(4)(a) of Cap. 161B, the Secretary may publish a notification of the result of an election held for the purpose of filling an office in the Medical Council under the proposed section 3(2)(j) of Cap. 161 in the Gazette. However, the Secretary must, pursuant to the proposed new section 3(9) of Cap. 161, publish a notification in the Gazette of a person's election or nomination to the office in the Medical Council under the proposed

new section 3(2)(ga) or (gb), the proposed section 3(2)(h) or section 3(2)(i) of Cap. 161. Please consider to adopt a consistent approach in both the proposed section 24(4)(a) of Cap. 161B and the proposed new section 3(9) of Cap. 161 as to publication of such notifications.

#### Further issue under Part 3 of the Bill

35. In view of the proposed amendment made under clause 4(17) of the Bill to section 3(5B)(b) of Cap. 161 that the nomination of a registered medical practitioner to fill the vacancy of the Medical Council concerned for appointment by the Medical Council is to be made by a member of the Medical Council who is a registered medical practitioner, section 8 of Cap. 161B should also be amended correspondingly. Please also clarify whether it is the policy intention that the Secretary is required, after a person is so appointed by the Medical Council pursuant to the proposed section 3(5B)(b) of Cap. 161, to publish a notification in the Gazette of the person's appointment. If so, please provide so, as such requirement is not provided for in the proposed new section 3(9) of Cap. 161 and the proposed section 24(4)(a) of Cap. 161B.

#### Clause 44 of the Bill

36. The proposed section 8(1) of the Medical Registration (Miscellaneous Provisions) Regulation (Cap. 161D) provides that the section applies where a legal adviser gives advice on a question of law as to evidence, procedure or any other matter at proceedings or meetings stated in the proposed section 8(1)(a) to (c) of Cap. 161D. Please explain the reason(s) that the section does not apply to the meetings of the Medical Council or an inquiry panel as mentioned in the proposed section 6(1)(a) or (c) of Cap. 161D.

#### Clause 51 of the Bill

37. Please clarify whether the proposed section 9 or section 10 of Cap. 161E applies if the chairman and deputy chairman of the PIC concerned have referred the case in question to HC for a hearing under section 6(4) of Cap. 161E and after certification and report back by HC, the chairman or deputy chairman has directed the case be investigated further under section 6(5) of Cap. 161E. It is noted that both the proposed section 9(1) and section 10(1) of Cap. 161E provide that the sections apply, among other things, where the case

in question has not been referred to HC under the proposed section 6 of Cap. 161E.

Clause 54 of the Bill

38. In section 13(4) of Cap. 161E, please replace "subsection (1)" with "subsection (1)(b)", if it is intended that the section refers to the notification as stated in the proposed section 13(1)(b), but not the proposed section 13(1)(a), of Cap. 161E.

Clause 55 of the Bill

39. Please explain the reason(s) that the proposed new section 13A of Cap. 161E, which concerns declaration of interest by members of an inquiry panel, does not apply to an inquiry held by an inquiry panel under the proposed section 21(1) of Cap. 161.
40. Please also note the observation in Question 16 where another inquiry panel is appointed under the proposed new section 13A(4) of Cap. 161E.

Clause 56 of the Bill

41. Please explain the reason(s) for not providing in the proposed section 15(1)(b) of Cap. 161E that the chairperson of the inquiry panel concerned may refer the case in question to EC for consideration. It is noted that under the proposed new section 20Y(a) of Cap. 161, an inquiry panel may, in the course of its inquiry into a case, refer the case to EC for consideration.

Clause 63 of the Bill

42. Under the proposed section 21(2) of Cap. 161E, a solicitor or counsel, including a legal officer within the meaning of the Legal Officers Ordinance (Cap. 87), may be appointed to carry out the duties of the Secretary in respect of an inquiry by an inquiry panel. Under section 50 of Cap. 161E, on the other hand, a solicitor, counsel or such a legal officer may be appointed to represent a committee in the hearing of an appeal under Part VII, VIII or IX of Cap. 161E. Given the definitions of "solicitor" and "counsel" under section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) and the definition of "legal officer" under Cap. 87, please clarify whether it is the policy intention of the proposed section 21(2)

of Cap. 161E that such a legal officer, in order to be qualified for appointment, must either be a solicitor or counsel (i.e. must be admitted before the Court of First Instance to practise as a solicitor or counsel).

Clause 74 of the Bill

43. In the taking of votes of an inquiry panel pursuant to the proposed section 32 of Cap. 161E, please explain how equal votes could arise as contemplated in the proposed section 32(3) of Cap. 161E, given that an inquiry panel is to consist of five persons and that all of them must be present throughout the inquiry proceedings pursuant to the proposed new section 20X of Cap. 161.

Clause 75(9) of the Bill

44. Under the proposed section 33(4) of Cap. 161E, please clarify whether it is the policy intention that, after the certification of HC as mentioned in the section, the inquiry panel concerned must either commence or resume the inquiry, as reflected in the current section 33(4) of Cap. 161E. If so, please consider to replace "may commence or resume the inquiry" with "must commence or resume the inquiry".

Clause 76(2) to (4) of the Bill

45. Please consider to expand the scope of the proposed section 34(1) of Cap. 161E to the effect that the section also applies where an inquiry panel has decided to review its order under the proposed section 21(4B) of Cap. 161 and has further decided to invite the parties to the inquiry to attend the review. Under the proposed section 21(4B) of Cap. 161, an inquiry panel may review, in addition to its decision, its order made in an inquiry.
46. Please consider, for the sake of consistency and completeness, to amend the proposed section 34(1) of Cap. 161E to deal with the scenario where an inquiry panel has decided, for the purpose of a review under the proposed section 21(4B) of Cap. 161, to invite other persons who have appeared before it in the inquiry concerned to appear again before it pursuant to the proposed section 21(4C) of Cap. 161.



Clause 78 of the Bill

47. Section 37(6) of Cap. 161E states that witnesses called on behalf of any party to the hearing may be questioned by specified persons, including the deputy chairman of HC. Under the proposed section 20U of Cap. 161, HC does not have a deputy chairman. Please clarify.

Clauses 80(2) and (3) and 82 of the Bill

48. Under the proposed new section 39(3) of Cap. 161E, "section 21 order" is defined to mean, in relation to a registered medical practitioner, an order made under the proposed section 21(1) of Cap. 161 as a result of a finding by HC of the practitioner's physical or mental unfitness to practise. Please clarify under the proposed regime of the Bill, the provision(s) of Cap. 161 under which an inquiry panel may make an order under the proposed section 21(1) of Cap. 161 as a result of such a finding. It is noted that the Bill proposes to prescribe the Medical Council, instead of an inquiry panel, to make an order against a registered medical practitioner as a result of the practitioner's unfitness to practise medicine, surgery or midwifery by reason of health. Please also note that a review on the proposed amendments made under the Bill to sections 39 and 41 of Cap. 161E may have to be done.

## **Schedule 2: Drafting Issues**

### Clause 3 of the Bill

1. With respect to the definition of "Secretary" under section 2(1) of Cap. 161, please consider, in the light of the proposed renumbering of section 3B of Cap. 161 under clause 5(1) of the Bill, to replace "section 3B" with "section 3B(1)". Please note the proposed definition of "legal adviser" to be added to section 2(1) of Cap. 161 pursuant to clause 3(2) of the Bill.

### Clause 4 of the Bill

2. Under section 3(2)(d) of Cap. 161, "the University of Hong Kong" should be "The University of Hong Kong".
3. Under the proposed new section 3(2)(gb) of Cap. 161, the Consumer Council is entitled to nominate one lay member to be a member of the Medical Council. Should the word "appointed", instead of "nominated" be used, as in section 3(2)(g) of Cap. 161? It is because the process of becoming such a member does not require further appointment to be made by CE (as in section 3(2)(c), (d), (da) and (db) of Cap. 161) or the Medical Council (as in the case of lay assessors and medical assessors under the proposed new sections 20BB(1) and (4) and 20BC(1) and (4) of Cap. 161).
4. In the proposed new section 3(3AA) of Cap. 161, please consider to add ", other than a member elected or appointed to fill a vacancy caused by a person ceasing to be a member in accordance with subsection (4) or (6A)" after "a member described in subsection (2)(ga)". A member elected or appointed to fill such a vacancy only holds office for the remainder of the term concerned pursuant to the proposed new section 3(5AAB) of Cap. 161, instead of for three years as stated in the proposed new section 3(3AA) of Cap. 161. It is noted that similar approach is adopted in the proposed section 3(3A) of Cap. 161.
5. Please note the observation mentioned in Question 4 above with respect to the proposed new section 3(3AAB) and (3AAC) of Cap. 161. The term of office of a member nominated or elected to fill a relevant vacancy under the proposed new section 3(5AAD) or (5AAF) of Cap. 161 is different from that as prescribed in the proposed new section 3(3AAB) or (3AAC) of Cap. 161.

6. In the proposed section 3(3A) of Cap. 161, please consider to add "or appointed" after ", other than a member described in subsection (5C) or (5D) or elected", in view of the proposed section 3(5B)(b) of Cap. 161 which provides for the appointment of a registered medical practitioner by the Medical Council to fill a vacancy in respect of a seat described in the proposed section 3(2)(j) of Cap. 161.

#### Clauses 6 and 7 of the Bill

7. It is noted that the proposed section 3C(1) and (1A) of Cap. 161 mention about a person who is disqualified from holding office under the proposed section 3 of Cap. 161 or who has been removed from office under that section. The proposed section 3 of Cap. 161, however, does not contain any reference to disqualification from holding office or removal from office. Please consider to refine the drafting of the proposed section 3C(1) and (1A) of Cap. 161.
8. Please consider to refine the phrases "appointment under section 3(2)" and "appointment of a member thereof" contained in the proposed section 3C(1A) and section 4(3) of Cap. 161 respectively to reflect that some members of the Medical Council would be elected or nominated by specified persons under the proposed regime of the Bill.

#### Clause 13 of the Bill

9. In the proposed new section 20BD(3)(c) of Cap. 161, please consider to add "," after "becomes bankrupt" to improve the clarity of the provision and for the sake of consistency with the proposed section 3(6)(c) or (6A)(c) of Cap. 161.

#### Clause 23(16) and (17) of the Bill

10. In the proposed section 21(1)(iva) of Cap. 161, "such order take effect" should be "such order takes effect".

#### Clause 24 of the Bill

11. In section 21A(1)(d) of Cap. 161, "such order take effect" should be "such order takes effect".

Clause 31(7) of the Bill

12. In the proposed section 33(4)(a)(viii) of Cap. 161, "the procedure to be followed in relation to" is redundant.

Clause 34 of the Bill

*Proposed new Schedule 5 to Cap. 161*

13. Please confirm whether the name of "Hong Kong Medical Association" as specified in item 6 of Table 2 of the proposed new Schedule 5 to Cap. 161 is accurate. It appears from its website that its name is "The Hong Kong Medical Association".
14. For the sake of certainty, should further information be added to describe "Hong Kong Doctors Union" and "Hong Kong Public Doctors' Association" as contained in items 7 and 8 of Table 2 of the proposed new Schedule 5 to Cap. 161 respectively? Are they companies incorporated under the Companies Ordinance (Cap. 622)?

*Proposed new Schedule 6 to Cap. 161*

15. The subcommittee as referred to in the proposed new section 2(b) of the proposed new Schedule 6 to Cap. 161 is established under section 20BA(8), instead of section 20BA(1), of Cap. 161.
16. The proposed new section 3 of the proposed new Schedule 6 to Cap. 161 provides that if the terms of offices of assessors appointed under section 21B(2)(a), (b), (c), (d) or (e) of Cap. 161 have not yet expired before the Commencement, such assessors are, on and after the Commencement, taken to be holding offices under the proposed new section 20BC(4) of Cap. 161 for the remainder of their terms. It is noted that these assessors have been nominated by certain persons before the Commencement and that those persons are also authorities ("the Nominating Authorities") which may nominate medical assessors after the Commencement under the proposed new section 20BC(1) of Cap. 161 (i.e. items 1 to 5 of Table 2 of the proposed new Schedule 5 to Cap. 161).

Please confirm whether these assessors would be counted as assessors nominated by the relevant Nominating Authorities under the proposed new section 20BC(4) for the purpose of calculating the

maximum number of assessors that the relevant Nominating Authorities may nominate under the proposed new section 20BC(6) of Cap. 161. If so, please consider, for the sake of clarity, to amend the proposed new section 3 of the proposed new Schedule 6 to provide so.

17. Please note the observations set out in Question 16 above regarding assessors who are, pursuant to the proposed new section 4 of the proposed new Schedule 6 to Cap. 161, taken to be holding offices under the proposed new section 20BB(4) of Cap. 161.
18. Cap. 161 currently does not provide for a "president" of a meeting of the Medical Council. Please consider to amend the phrase "the function of the president" in the proposed new section 6(2)(b) of the proposed new Schedule 6 to Cap. 161.

#### Clause 35(4) of the Bill

19. In the proposed section 4(2)(d) of Cap. 161B, please consider to add "a" before "composition".

#### Clause 41 of the Bill

20. In paragraph 2 of Part II of the proposed Form 2 in Schedule 1 to Cap. 161B, please consider to replace "as a candidate and for election" with "as a candidate in an election" to align with section 4(1) of Cap. 161B.

#### Clause 54(1) and (4) of the Bill

21. As the proposed new section 13(8) of Cap. 161E deals with reconsideration of cases instead of holding inquiries, please consider to amend the heading of the proposed section 13 of Cap. 161E to reflect so.

#### Clause 55 of the Bill

22. Please consider to amend the proposed new section 13A(2) and (3) of Cap. 161E in view of the application of the proposed section 13A of Cap. 161E to a review of a decision or an order made by an inquiry panel under the proposed section 21(4B) of Cap. 161. The descriptions "before the opening of an inquiry" and "at any stage of the inquiry" in the proposed new section 13A(2) and (3) of

Cap. 161E may not be appropriate for application to a review under the proposed section 21(4B) of Cap. 161, as the review has to be commenced within the prescribed time after the conclusion of the inquiry in question.

23. Please consider, for the sake of consistency and completeness, to amend the proposed section 21(4B) or proposed new section 21(4CA) of Cap. 161 to cater for a situation where another inquiry panel may be appointed to conduct the review under the proposed section 13A(4) of Cap. 161E.



中華人民共和國香港特別行政區  
Hong Kong Special Administrative Region of the People's Republic of China



立法會秘書處 法律事務部  
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LEGISLATIVE COUNCIL SECRETARIAT

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15 March 2016

Mr FONG Ngai  
Prin AS for Food & Health (Health)3  
Food and Health Bureau  
19/F, East Wing  
Central Government Offices  
2 Tim Mei Avenue, Tamar  
Hong Kong

Dear Mr FONG,

### **Medical Registration (Amendment) Bill 2016**

I am scrutinizing the legal and drafting aspects of the Bill and should be grateful for your clarification on the issues set out below.

#### **Part I: Legal Issues**

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

At the meeting of the Panel on Health Services on 29 February 2016, a member raised a concern regarding the constitutionality of bills, if passed, which seek to amend the composition of membership of the governing bodies of professional organizations under existing legislation in the light of Article 142(3) of BL. Please explain the limitation imposed by Article 142(3) of BL in respect of such a legislative proposal and how the proposals under the Bill regarding the membership of the Medical Council of Hong Kong (the Medical Council) and its committees are in compliance with Article 142(3) of BL.

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

The proposed section 21(4A) of the Medical Registration Ordinance (Cap. 161) provides that a member of a Preliminary Investigation Committee (PIC) who is also a member of the Medical Council must not attend a meeting of the Medical Council whilst it is inquiring into a complaint or information, in the preliminary investigation of which such member took part. Since a lay assessor or an assessor who is a registered medical practitioner, being a non-member of the Medical Council, may be appointed to a PIC pursuant to the proposed section 20S of Cap. 161 and that such an assessor may attend a meeting of the Medical Council held for a disciplinary inquiry under section 21 of Cap. 161, please advise whether the restriction under the proposed section 21(4A) of Cap. 161 should be extended to cover such an assessor who has taken part in the relevant preliminary investigation.

Please also explain the reason(s) that the restriction imposed under the proposed section 21(4A) of Cap. 161 does not apply to a member of the Health Committee or the Education and Accreditation Committee who has participated in the relevant preliminary investigation, as such committees may also refer a matter for the consideration by the Medical Council.

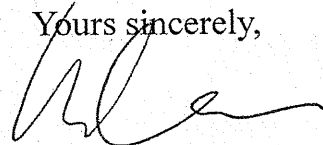
**Part II: Drafting Issue**

Clause 10 and Part 1 of Schedule 1

Under section 21(4C) of Cap. 161, should "the council" rather be "the Council"?

I would be grateful if you could let me have your reply in bilingual form as soon as possible, preferably on or before 12:00 pm on 18 March 2016.

Yours sincerely,



(Wendy KAN)

Assistant Legal Adviser

c.c. DoJ (Attn: Miss Cindy CHEUK (By Fax: 3918 4613))  
Clerk to Bills Committee  
LA  
SALA3





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

*Our Ref.: L/M to FH CR 1/F/3261/92 Pt.23*

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18 March 2016

Ms Wendy KAN  
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Legislative Council Secretariat  
Legislative Council Complex  
1 Legislative Council Road  
Central, Hong Kong

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 evolution 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”)<sup>1</sup> 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.<sup>2</sup>

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.

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<sup>1</sup> CACV 205, 206 /2011, CACV 209 /2011

<sup>2</sup> 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

c.c. DoJ (Attn: Miss Cindy CHEUK (By Fax: 3918 4613))  
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