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LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

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31 March 2025

Mr Kasper NG
Principal Assistant Secretary (Further Education)
Education Bureau
Further and Higher Education Branch
Further Education Division
7/F, East Wing, Central Government Offices
2 Tim Mei Avenue
Tamar, Hong Kong

Dear Mr NG,

Post Secondary Colleges (Amendment) Bill 2025

We are scrutinizing the captioned Bill with a view to advising Members on its legal and drafting aspects. To facilitate Members' consideration of the Bill, we should be grateful if you could clarify the matters set out in the Appendix.

Please let us have your response in both Chinese and English as soon as practicable, preferably before the second meeting of the Bills Committee. Thank you.

Yours sincerely,

(Quincy NG)

Assistant Legal Adviser

Encl.

c.c. Department of Justice
(Attn: Mr Salvador TSANG, Senior Assistant Law Draftsman I(5))
(By email: salvadortsang@doj.gov.hk)
Legal Adviser
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Registration of a post secondary college (clause 9 of the Bill)

Exemption of eligibility requirements for registration

1. Under the proposed new section 4A(4) of Cap. 320, in deciding whether to approve an application for registration of a post secondary college (“College”), the Secretary for Education (“Secretary”) may exempt the College from complying with any of the eligibility requirements specified in the proposed revised section 4(1) of Cap. 320. Please clarify (a) under what circumstances would such an exemption be granted to a College; and (b) whether it is necessary to expressly provide in the Bill as to whether and how the Secretary would exercise the discretion to grant an exemption.

Conditions imposed on the registration of a College

2. Under the proposed new section 4A(5) of Cap. 320, the Secretary may impose conditions on the registration of a College as the Secretary considers appropriate. Please clarify (a) what conditions might be imposed; (b) what factors would be taken into account in determining whether the conditions imposed are appropriate; and (c) whether it is necessary to specify those factors in the Bill for clarity and certainty.

Registration of a person (clause 11 of the Bill)

Eligibility requirement

3. Under the proposed new section 5A(4) of Cap. 320, a person is eligible to be registered as a member of the Board of Governors (“BoG”), a President, a Vice-President or a teacher of a registered College if the person is a fit and proper person to act as such a member, President, Vice-President or teacher. In paragraph 12 of the Legislative Council Brief (File Ref.: 1141-2030-8010-9005-00007) issued by the Education Bureau in March 2025, it is stated that the Education Bureau will promulgate administrative guidelines on the “fit and proper” criterion. Please consider whether the matters that the Permanent Secretary for Education (“Permanent Secretary”) may take into account in determining whether a person is “fit and proper” should be set out in the Bill for clarity and certainty. Reference can be made to section 20Q(1) of the Accounting and Financial Reporting Council Ordinance (Cap. 588) and section 8(5) of the Buildings Energy Efficiency (Registered Energy Assessors) Regulation (Cap. 610B).

Procedures after an application for registration of a person is approved

4. Under the proposed new section 5A(5) of Cap. 320, if the Permanent Secretary is satisfied that a subject person is eligible to be registered and approves

the application for registration, the Permanent Secretary “may” enter the name of the subject person in the relevant registers, and “may” by written notice, inform the applicant and the subject person of the approval. It is noted that under the proposed new section 4A(6) of Cap. 320, the Permanent Secretary “must” enter the name of the College in the register of registered Colleges and “must” by written notice, inform the applicant of the approval. Please clarify the different approaches adopted under the proposed new sections 4A(6) and 5A(5) of Cap. 320.

Cancellation or suspension of registration of a registered College or person (clause 13 of the Bill)

5. It is noted that while the Secretary and the Permanent Secretary may impose conditions and/or restrictions on the registration of registered Colleges and members of BoG, Presidents, Vice-Presidents and teachers as he or she “considers necessary” under the proposed new sections 6A(1)(b) and (2)(b), and 6B(2)(b) and (3)(b) of Cap. 320 respectively, the Secretary may impose conditions on the registration of a College as he or she “considers appropriate” under the proposed new section 4A(5) of Cap. 320 (see paragraph 2 above). Please clarify the difference between the factors to be considered in determining whether the conditions/restrictions are “necessary” and whether the conditions/restrictions are “appropriate”.

Written notice from the Permanent Secretary (clauses 9, 11 and 13 of the Bill)

6. It is noted that in relation to the refusal to approve an application for the registration of a College and the refusal to approve an application for the registration of a member of BoG, a President, a Vice-President or a teacher of a registered College, the Bill does not provide for the time limit that the Permanent Secretary must, by written notice, inform the relevant applicant and subject person of the refusal and the reasons for the refusal (the proposed new sections 4A(8) and 5A(7) of Cap. 320). Please consider whether a specified time limit should be set out for the sake of certainty.

7. In relation to the cancellation or suspension of the relevant registration, it is also noted that under the proposed new sections 6A(5), 6B(9), 6C(5)(b), and 6C(6)(b) of Cap. 320, as soon as reasonably practicable after refusing to approve the application for, or cancelling or suspending, the relevant registration, the Permanent Secretary must, by written notice, inform the relevant applicant or persons of the decision with the relevant reasons. Please consider whether a specified time limit should be set out for the sake of certainty.

Proposed new offences (clauses 13 and 36 of the Bill)

8. The Bill proposes to introduce a number of new offences under the proposed new sections 6A(8), 6C(9), and 6D(1), (4), (7) and (10) of Cap. 320,

and under the proposed new section 101(3) and (4) of the Education Ordinance (Cap. 279). It is noted that except for the proposed new offence under the proposed new section 6D(1) of Cap. 320 which expressly requires the element of intention (i.e. providing information that is false or misleading in a material particular when the person knows or reasonably ought to know that the information provided is false or misleading in a material particular), the other new offences proposed under clauses 13 and 36 of the Bill (collectively, “Other Offences”) do not expressly require the proof of *mentes reae* (i.e. the mental elements).

9. Please clarify:

- (a) whether it is the Administration’s legislative intent that the provisions under the proposed new section 6D(3), (6) and (9) of Cap. 320 would be construed as negative averments contemplated by section 94A of the Criminal Procedure Ordinance (Cap. 221) (i.e. the defendant bears the burden to prove on a balance of probabilities that he or she falls within the relevant exceptions);
- (b)
 - (i) whether it is the Administration’s legislative intent that each of the Other Offences is a strict liability offence (i.e. the prosecution needs not prove the existence of *mentes reae* of committing the offence);
 - (ii) if the answer in (b)(i) above is in the affirmative, whether the implied common law defence of “honest and reasonable mistaken belief” would be available to a person charged with any of the Other Offences, and if so, whether the defendant would only bear an evidential burden (i.e. the second alternative referred to in *Kulemesin Yuriy and Another v HKSAR* (2013) 16 HKCFAR 195 (“*Kulemesin*”)), or would be required to discharge a persuasive burden (i.e. the third alternative referred to in *Kulemesin*), as to the defendant’s belief;
 - (iii) if it is the Administration’s legislative intent that the third alternative referred to in *Kulemesin* applies, how the derogation of the constitutional right to be presumed innocent under Article 87 of the Basic Law and article 11(1) of the Hong Kong Bill of Rights could satisfy the rationality and proportionality tests laid down in *Hysan Development Co Ltd and Others v Town Planning Board* (2016) 19 HKCFAR 372; and
 - (iv) if it is the Administration’s legislative intent that the implied common law defence of “honest and reasonable mistaken

belief” would not be available to a person charged with any of the Other Offences, please clarify why the implied common law defence of “honest and reasonable mistaken belief” is considered to be replaced or excluded by the statutory reasonable excuse defence (i.e. the fourth alternative referred to in *Kulemesin*); and

- (c) whether it is the Administration’s legislative intent that the new offence under the proposed new section 101(4) of Cap. 279 is an absolute liability offence (i.e. the fifth alternative referred to in *Kulemesin*), given that no statutory defence is provided for this offence. If so, please provide justification(s) for making it an absolute liability offence.

Levels of penalties (clause 13 of the Bill)

10. Under the proposed new section 6D(4) of Cap. 320, a person who acts as a member of BoG of a registered College when the person is not registered as such or the registration is suspended or cancelled would commit an offence and be liable on conviction to a fine of \$250,000 and imprisonment for two years. Under the proposed new section 6D(7) of Cap. 320, a person who acts as a President or a Vice-President of a registered College when the person is not registered as such or the registration is suspended or cancelled would commit an offence and be liable on conviction to a fine at level 6 (\$100,000) and imprisonment for two years. Under the proposed new section 6D(10) of Cap. 320, a person who acts as a teacher of a registered College when the person is not registered as such or the registration is suspended or cancelled would commit an offence and be liable on conviction to a fine at level 5 (\$50,000) and imprisonment for two years. Please clarify the reason(s) for setting different maximum levels of fine for these three proposed new offences.

Appeals (clause 13 of the Bill)

11. The proposed new sections 6E and 6F of Cap. 320 seek to respectively provide for matters that are appealable to the Chief Executive in Council (“CE in C”) by way of a petition or to the Chief Secretary for Administration (“CS”). It is proposed that a determination of CE in C under the proposed new section 6E of Cap. 320 and that of CS under the proposed new section 6F of Cap. 320 would be final. Please clarify whether Article 82 of the Basic Law would be engaged, and if so, how the proportionality test referred to in *Mok Charles v Tam Wai Ho* [2011] 2 HKC 119 could be satisfied, regarding the proposed finality of the respective determination of CE in C and CS, which would appear to restrict or limit the power of final adjudication vested in the Court of Final Appeal.

Publication of extracts of strategic plan and annual reports, etc. (clauses 28 and 29 of the Bill)

12. Under the proposed new regulations 8A, 8B and 9(3) of the Post Secondary Colleges Regulations (Cap. 320A), a registered College must make available to the public extracts of strategic plan and annual report, and certain financial information. Please clarify how these information should be made available to the public.

Drafting issues

13. It is noted that clause 5(3)(b) of the Bill proposes to repeal the definition of “College” under the existing section 2 of Cap. 320. Please consider whether (a) “College” in the English text of, and “學院” in the Chinese text of, the proposed revised section 4(1)(j) and (m) of Cap. 320 should be amended to “Post Secondary College” and “專上學院” respectively; and (b) “學院” in the Chinese text of the proposed revised section 4(1)(h) of Cap. 320 should be amended to “該專上學院”.

14. It is noted that “處理限期” is proposed to be adopted as the Chinese rendition of “compliance period” under the proposed new sections 6A and 6B of Cap. 320 (clause 13 of the Bill). Please consider whether “遵從限期” or “遵守限期” would better reflect the meaning of “compliance period”. Reference is made to section 72A(4), (9E) and (11) of the Road Traffic Ordinance (Cap. 374) and section 66 of the Competition Ordinance (Cap. 619).