

Legal Practitioners (Amendment) Bill 2009 (“Bill”)

Introduction

This paper provides the Administration’s response to the following requests made by Members at the second Bills Committee meeting held on 7 September 2009:

- (a) To consider amending “the Chairman of the Bar Council” in section 39E(4)(b) to “the Chairman of the Bar Association”, to achieve consistency with the use of “the President of the (Law) Society” in section 39E(4)(a);
- (b) To revert on the applicability of “the six-year and the six-board” rules to the Higher Rights Assessment Board; and
- (c) To provide a table setting out the major recommendations made by the Working Party on Solicitors’ Rights of Audience and the relevant policy considerations behind those recommendations, and how such recommendations/policies were reflected in the Bill.

Amending “the Chairman of the Bar Council” in section 39E(4)(b) to “the Chairman of the Bar Association”

2. In preparing the Bill, we noted that the term “the Chairman of the Bar Council” is used in sections 31A(1) and (4) of the Legal Practitioners Ordinance (Cap.159) and considered it appropriate to use the same term in the proposed section 39E(4)(b) because all these sections impose a requirement to consult the Chairman of the Bar.

3 Following the request made by the Bills Committee, we have consulted the Hong Kong Bar Association and were advised that the Bar would have ‘no objection to use the expression “the Chairman of the Bar Association” instead of “the Chairman of the Bar Council” for the purposes of the Legal Practitioners Ordinance (Cap 159).’ A copy of the Bar Association’s letter dated 28 September 2009 is at **Annex A**.

4 Given the views of the Bar Association and that under Regulation 6 of the *Rules, Regulations and By-laws of the Hong Kong Bar Association*, the Chairman of the Bar Association is ex officio the

Chairman of the Bar Council, we have no objection to the proposed amendment should the Bills Committee consider it more appropriate to refer to the Chairman of the Bar Association in the proposed section 39E(4)(b)¹.

Applicability of the Six-year and the Six-board Rules (Rules)

5. We do not propose to apply the Rules to the Higher Rights Assessment Board for the following reasons:

- (a) Except possibly in relation to the panel of lay members under the proposed section 39E(5) (“Panel”), the pool of persons who are eligible for appointment to the Board is quite small and there could be practical difficulties in identifying sufficient volunteers to fill all the positions if they were bound by the strict requirements of the Rules that they could only serve two terms.
- (b) With regard to the appointments of Board members who are solicitors, Senior Counsel and representative of the Department of Justice, the Chief Justice must consult the President of the Law Society, the Chairman of the Bar Council and the Secretary for Justice under the proposed section 39E(4). Those recommending authorities might have good reasons for recommending a particular nominee to serve more than two three year terms.
- (c) Under the proposed section 39E(3), the lay member would be selected by the chairperson of the Board from a panel of persons appointed by the Chief Justice. It would be at the discretion of the chairperson whether to select a single member for an extended period or to rotate the Panel members. At this stage, it would not be desirable to anticipate how the chairperson will make his or her selection and it would be best to avoid the inflexibility that would arise if the appointment to the Panel cannot be for a period of longer than six years.

¹ As the term “Bar Association” is not defined in Cap.159, the expression to be used in the proposed section 39E(4)(b) should be “the Chairman of the Hong Kong Bar Association”. The proposed section 39F(4)(b) would be similarly amended.

6. The Judiciary have been consulted and they expressed agreement with the above policy. It is considered best for the Chief Justice to develop his policy on the number of terms that a member could serve in the light of experience gained after the establishment of the Board and after taking into account the views of the chairperson and the nominating authorities.

The Table

7. Members will note from the Table at **Annex B** that most of the recommendations made by the Working Party on Solicitors' Rights of Audience in its final report of October 2007 have been reflected in the Bill. The major exceptions are in respect of recommendations 4 and 5 where certain modifications were made in response to comments made by the Chief Justice.

Department of Justice
September 2009

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HONG KONG BAR ASSOCIATION

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28 September 2009

Dear Mr. Ng,

Re: Legal Practitioners (Amendment) Bill 2009

I refer to your letter dated 15 September 2009 addressed to Mr. Rimsky Yuen SC and copied to our Chairman Mr. Russell Coleman SC. The letter has been passed to me by Mr. Yuen and we have discussed the matter.

The expression "the Chairman" is defined in Regulation 1 of the Bar's Rules, Regulations and By-laws as the Chairman of the Bar Association. In light of this and also in light of Regulation 6 (which was helpfully pointed out in your letter under reply), we have no objection to use the expression "the Chairman of the Bar Association" instead of "the Chairman of the Bar Council" for the purpose of the Legal Practitioners Ordinance (Cap. 159).

Best Regards.

Yours faithfully,

Mr. Paul Shieh SC
Vice-Chairman

c.c. Mr. Rimsky Yuen, S.C.

香港大律師公會

香港金鐘道三十八號高等法院低層二樓

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Mr. Robin Egerton 艾家敏

Ms. Jolie Chao 趙芷筠

Table on Major Recommendations and Policy Considerations by the Working Party on Solicitors' Rights of Audience

In the following table:

- 1) "Assessment Board" means the Higher Rights Assessment Board to be established under the Bill;
- 2) "Bill" means the Legal Practitioners (Amendment) Bill 2009;
- 3) "Consultation Paper" means the Consultation Paper by the Working Party on Solicitors' Rights of Audience in May 2006 ;
- 4) "Final Report" means the Final Report of the Working Party on Solicitors' Rights of Audience in October 2007;
- 5) "WP" means the Working Party on Solicitors' Rights of Audience which was established by the Chief Justice on 24 June 2004;

Recommendation Number in the Final Report	Extracts of the recommendation in the Final Report	Policy Considerations behind the Recommendation	Extracts of the Provisions in the Bill	Remarks
1	Applicants for higher rights of audience must have five years' post-qualification practice of which at least two years must have been in Hong Kong.	Having considered the various views expressed on this issue, the WP concluded that a minimum period of practice should be a pre-requisite for a solicitor to gain higher rights of audience. In this connection, the WP believed that that approach properly balanced the public interests in expanding the pool of competent advocates in the higher courts while maintaining the viability of an independent Bar. (<i>see paragraph 27 of the Final</i>	The applicant has the requisite experience if, during the period of 7 years immediately before the date of the application, the applicant- (a) has, for not less than 2 years in the aggregate, done one or more of the following- (i) practised as a solicitor in Hong Kong; (ii) practised as a barrister in Hong Kong; (iii) practised as a legal officer within the meaning of section 2 of	-

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		<p><i>Report)</i></p> <p>The WP noted that strong views were expressed on consultation both for and against allowing overseas experience to count towards the minimum practice period. On balance, the WP was persuaded that experience in a common law jurisdiction should be taken into account, but that a minimum period of practice in Hong Kong should be prescribed. To that end, the WP considered that two years was an appropriate minimum period of Hong Kong practice, and so recommended it. <i>(see paragraph 28 of the Final Report)</i></p>	<p>the Legal Officers Ordinance (Cap 87) or held a similar office; and</p> <p>(b) has, for not less than 3 further years in the aggregate, done one or more of the following-</p> <ul style="list-style-type: none"> (i) practised as a solicitor in Hong Kong; (ii) practised as a barrister in Hong Kong; (iii) practised as a legal officer within the meaning of section 2 of the Legal Officers Ordinance (Cap 87) or held a similar office; (iv) practised the law of any other common law jurisdiction while being qualified to do so under the law of that jurisdiction, whether or not also under this Ordinance. <p><i>(see the proposed section 39I(2))</i></p>	

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2	<p>The three years immediately preceding the application must include what an assessment board considers to be sufficient litigation experience, with the greatest weight being given to actual advocacy.</p>	<p>In acknowledging the difficulty of prescribing with precision what should constitute appropriate litigation experience, the WP was of the view that some measure of discretion would need to be applied by the Assessment Board. While the WP concluded that an applicant for higher rights of audience should be required to show that he had three years of relevant recent litigation experience, the WP also decided that the Assessment Board should be given a degree of latitude in determining what amounts to relevant litigation experience. The WP also took the view that different weight would need to be given to different types of experience, with much weight given to actual advocacy, whether written or oral. <i>(see paragraph 32 of the Final Report)</i></p>	<p>The Assessment Board may grant the applicant only if it is satisfied that the applicant has acquired sufficient experience in litigation work in the course of ordinary practice within the period of 3 years immediately before the date of the application, so as to be a suitable person to have the higher rights of audience for which the application is made. <i>(see the proposed section 39L(1)(b))</i></p> <p>In that respect the Assessment Board must accord due weight to the applicant's experience in advocacy work, whether written or oral. <i>(see the proposed section 39L(2)(a))</i></p>	-

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3	Successful applicants should be granted higher rights of audience for civil proceedings, criminal proceedings or both.	<p>Most respondents to the Consultation Paper gave broad support to the Law Society's view that a solicitor should be able to apply for higher rights of audience in respect of civil proceedings, criminal proceedings, or both. The suggestion that a solicitor advocate should be limited to particular areas of law or a particular type of proceedings, or that they should be precluded from jury trials, was roundly rejected. The Bar Association supported the Law Society's view that solicitor advocates should be granted either civil or criminal rights of audience, or both, if they can demonstrate the requisite experience and skills.</p> <p><i>(see paragraph 43 of the Final Report)</i></p>	<p>The applicant must specify in the applications one of the following classes of proceedings in respect of which the applicant is applying for higher rights of audience:-</p> <p>(a) civil proceedings; (b) criminal proceedings; (c) both civil and criminal proceedings.</p> <p><i>(see the proposed section 39H(2))</i></p>	-

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4	<p>A Higher Rights Assessment Board should be established. This would be chaired by a senior judge, nominated by the Chief Justice, and would consist of the following additional members:</p> <p>(a) Two experienced members of the Judiciary, nominated by the Chief Justice;</p> <p>(b) Three litigation solicitors, nominated by the Council of the Law Society;</p> <p>(c) Three Senior Counsel,</p>	<p>It is important that the system for accreditation should ensure that it is not only the interests of solicitors which are taken into account, but that there is also input from the judiciary, the Bar and the wider community.</p> <p><i>(see paragraph 49 of the Final Report)</i></p>	<p>The Assessment Board consists of the following members appointed by the Chief Justice-</p> <p>(a) a chairperson, who must be an eligible person; and</p> <p>(b) 10 other members of whom-</p> <p>(i) 2 must be eligible persons;</p> <p>(ii) 3 must be solicitors who engage in litigation work ;</p> <p>(iii) 3 must be Senior Counsel;</p> <p>(iv) one must be a Law Officer or a Principal Government Counsel of the Department of Justice; and</p> <p>(v) one must be a person selected by the chairperson from among the panel of persons appointed by the Chief Justice.</p> <p><i>(see the proposed section 39E(3))</i></p>	<p>The Final Report recommended that the chairperson and two experienced members of the Judiciary should be nominated by the Chief Justice. Other members are to be nominated by the Council of the Law Society, the Bar Council or the Secretary for Justice, or to be selected by the Chairperson of the Assessment Board, as the case may require.</p> <p>The Chief Justice was of the view that it was not satisfactory to have the barrister and solicitor members simply nominated by the Law Society and the Bar Council respectively. According to the Chief Justice, under the nomination arrangement, in substance and also in perception, the member might be regarded as accountable to the professional body as its nominee. Thus, the Chief Justice suggested that the barrister and solicitor members should be appointed by the Chief</p>

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	<p>nominated by the Bar Council;</p> <p>(d) One member selected by the Chairman from a panel of persons appointed by the Chief Justice, who are not, in the opinion of the Chief Justice, connected in any way with the practice of law; and</p> <p>(e) A Law Officer or Deputy Law Officer in the Department of Justice, nominated by the Secretary for Justice.</p>		<p>Before making an appointment under subsection (3)(b)(ii), (iii) or (iv), the Chief Justice must consult-</p> <p>(a) in the case of an appointment under subsection (3)(b)(ii), the President of the Society;</p> <p>(b) in the case of an appointment under subsection (3)(b)(iii), the Chairman of the Bar Council; or</p> <p>(c) in the case of an appointment under subsection (3)(b)(iv), the Secretary for Justice <i>(see the proposed section 39E(4))</i></p>	<p>Justice in consultation with the Chairman of the Bar and the President of the Law Society. Accordingly, we have included in the Bill the power of the Chief Justice to appoint all members (including the chairperson) of the Assessment Board.</p>

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5	Application for higher rights of audience should be made to the Council of the Law Society, which will review applications before passing them with its recommendation for rejection or grant to the Assessment Board.	After having decided that the Assessment Board rather than the Council of the Law Society should be the accreditation body for granting higher rights of audience (<i>see recommendation 4 above</i>), the WP proposed that candidates for higher rights of audience should submit their applications to the Council of the Law Society. The Council of the Law Society would be required to review each application before passing it to the Assessment Board for consideration and decision. (<i>see paragraph 52 of the Final Report</i>)	<p>A solicitor who satisfies the eligibility requirements under section 39I may apply to the Assessment Board for higher rights of audience. (<i>see the proposed section 39H(1)</i>)</p> <p>As soon as practicable after an application is made to it under section 39H, the Assessment Board must consider the application, and decide whether to grant or refuse the application. (<i>see the proposed section 39K(1)</i>)</p> <p>As soon as practicable after a decision is made under section 39K(1), the Assessment Board must-</p> <ul style="list-style-type: none"> (a) notify the applicant of- <ul style="list-style-type: none"> (i) the decision; and (ii) if it refuses the application, the reasons for the decision; and (b) notify the Council of the decision. 	<p>In the Final Report, it was proposed that an application should be submitted to the Council of the Law Society which will review the application, and if the Law Society considered the application complied with the prescribed requirements, it will then pass the application to the Assessment Board.</p> <p>Having taken into account the Chief Justice's views, the Bill now provides that applications shall be made directly to the Assessment Board instead of the Council of the Law Society and that the Assessment Board is the sole decision maker of all the applications. According to the Chief Justice, it is important to define the roles in the above manner since the Council of the Law Society may otherwise be perceived to have a vested interest in the matter.</p>

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			<p><i>(see the proposed section 39K(2))</i></p> <p>For the purpose of ascertaining whether the applicant satisfies the eligibility requirements, the Assessment Board may make any enquiries with the Council that it considers appropriate. <i>(see the proposed section 39M(1)(a))</i></p>	
6	The Assessment Board should not be bound by the Council's recommendation, and it should be the Assessment Board's decision which is determinative.	Please refer to "Policy Considerations behind the Recommendation" regarding recommendation 5 above.	As soon as practicable after an application is made to it under section 39H, the Assessment Board must consider the application, and decide whether to grant or refuse the application. <i>(see the proposed section 39K(1))</i>	Please refer to the comments on recommendation 5 above.
7	In addition to satisfying the minimum practice requirements, an applicant should	This is to provide the Assessment Board with the discretion to refuse an application where, for instance, the Assessment Board is not	The Assessment Board may grant the application only if it is satisfied that the applicant is in all other respects a suitable person to have the higher rights	-

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	have to satisfy the Assessment Board that he is in all other respects suitable to be granted higher rights of audience.	satisfied as to the applicant's overall competence, professional conduct record or integrity. <i>(see paragraph 35 of the Final Report)</i>	of audience for which the application is made. <i>(see the proposed section 39L(1)(c))</i> In that respect , the Assessment Board may have regard to – i) the applicant's competence in advocacy work, whether written or oral; ii) the applicant's professional conduct and integrity; and iii) any other matters that the Assessment Board considers relevant. <i>(see the proposed section 39L(2)(b))</i>	
8	Applicants for higher rights of audience must either: (a) pass an Advocacy Course approved by the Assessment	There was a wide range of views expressed on this aspect of the Consultation Paper. Some favoured the least restrictive approach, arguing that a solicitor, whom the court must have been satisfied was a "fit and proper person to be a solicitor", was prima facie qualified to be an advocate	An applicant satisfies the eligibility requirement, if, among others, he has complied with the requirements prescribed by rules made by the Assessment Board under section 73CA(1)(a)(i), which cover requirements regarding possession or acquisition of qualifications, completion of courses or	-

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	<p>Board; or (b) satisfy the Assessment Board that they are suitably experienced and suitably qualified senior litigation practitioners to exercise higher rights of audience in proceedings relating to the qualification for which they have applied.</p>	<p>with rights of audience in the higher courts. Others argued that candidates for higher rights of audience must be able to demonstrate substantial advocacy experience in Hong Kong over many years. (<i>see paragraph 58 of the Final Report</i>)</p> <p>Having considered the views of those who responded to the Consultation Paper and the various possible alternatives, the WP concluded that there should be only 2 routes by which candidates could attain higher rights of audience, namely (a) to pass an advocacy course approved by the Assessment Board (“Qualification Route”); or (b) to satisfy the Assessment Board that they were suitably experienced and senior litigation practitioners to exercise higher rights of</p>	<p>training, or passing of assessments or examinations, relating to advocacy skills, practice and procedure applicable to courts, ethics or other matters. (<i>see the proposed section 39I(1)(c); and the proposed section 73CA(1)(a)(i)</i>)</p> <p>The applicant may elect to make the application on the basis of exemption from the requirements referred to in section 39I (1)(c). (<i>see the proposed section 39I(3)(a)</i>)</p> <p>If the applicant has elected to make the application on the basis of exemption from the requirements referred to in section 39(1)(c), the Assessment Board may grant the application only if it is satisfied that the applicant has complied with the alternative requirements prescribed by rules made by the Assessment Board under section</p>	

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		<p>audience (“Exemption Route”). <i>(see paragraph 59 of the Final Report)</i></p> <p>On the Exemption Route, the WP explained that it would enable solicitors with extensive overseas advocacy experience but limited Hong Kong experience to obtain higher rights of audience. It would also offer a means by which experienced Hong Kong solicitors (including barrister who has converted to become a solicitor) could qualify without the need to complete the advocacy course. <i>(see paragraph 61 of the Final Report)</i></p>	<p>73CA(1)(a)(iv), which cover requirements regarding possession or acquisition of advocacy or litigation experience or judicial or quasi-judicial experience. <i>(see the proposed sections 39L(1)(a) and 73CA(1)(a)(iv))</i></p>	
9	Successful applicants should be issued with a Higher Rights Qualification Certificate by the	Neither the Final Report nor the Consultation Paper provided an explanation on WP’s rationale for this recommendation. However, it is obvious that the	As soon as practicable after being notified of the granting by the Assessment Board of an application for higher rights of audience, the Council must issue to the person a certificate in	The Consumer Council has expressed the view that “The Council welcomes the provisions of Section 39Q that provide for a list of persons with higher rights of audience to be kept in the Council

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	Council of the Law Society. The Council must maintain a register of those granted Certificates, and must provide the Judiciary Administrator with the names of such persons.	recommendation was made with good reasons.	<p>respect of those rights (<i>see the proposed section 39P(1)</i>)</p> <p>The Council must keep a list of all persons who have acquired higher rights of audience (<i>see the proposed section 39Q(1)</i>)</p> <p>The Council must provide a copy of the updated list to the Registrar of the High Court (<i>see the proposed section 39Q(4)</i>)</p>	of Law Society, which is available for public inspection during office hours without payment.” (<i>see the Consumer Council’s Submission to the Legislative Council Bills Committee on Legal Practitioners (Amendment) Bill 2009 dated 31 August 2009</i>)
10	The conduct and discipline of solicitor advocates will be the responsibility of the Council of the Law Society, who will apply a code of conduct to be drawn up by the Council of the Law Society in consultation with the Bar Council and	Views were evenly split among those who responded to the Consultation Paper, with half in favour of the Law Society taking responsibility for the conduct and discipline of solicitor advocates and half against. Of those against, the majority proposed that this role should be taken on by an independent panel appointed by the Chief Justice. The Bar considered that once the changes in the code of conduct	The Council may, in consultation with the Chief Justice and the Bar Council, issue a code of conduct for the purpose of setting out standards of professional conduct to be observed by solicitor advocates. (<i>see the proposed section 39R(1)</i>)	-

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	the Judiciary.	<p>had been discussed and enacted, the Law Society should be responsible for the conduct and discipline of solicitor advocates. (<i>see paragraph 62 of the Final Report</i>)</p> <p>Among the arguments in favour of the Law Society taking responsibility for conduct of solicitor advocates was that a system by which some parts of a solicitor's conduct (the exercise of higher rights of audience) were regulated by a different body would invite complexity, possible inconsistency of approach and risk double jeopardy. A counter argument put forward was that the Law Society was not best placed to be entrusted with the task of disciplining solicitor advocates. (<i>see paragraph 63 of the Final Report</i>)</p>		

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		<p>Taking account of the various views expressed, the WP considered that the Council of the Law Society, in consultation with the Bar Council and the Judiciary, should draw up a code of conduct for solicitor advocates. <i>(see paragraph 65 of the Final Report)</i></p>		

**Department of Justice
September 2009**

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