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Report of the Bills Committee on Legal Practitioners (Amendment) Bill 2009

Purpose

This paper reports on the deliberations of the Bills Committee on Legal Practitioners (Amendment) Bill 2009.

Background

Existing rights of audience

2. With the legal profession in Hong Kong being comprised of two branches, a lawyer cannot at the same time be both a solicitor and a barrister, but must practise as one or the other. In very broad terms, the principal distinction between the two branches is that barristers specialize in advocacy and have unlimited rights of audience in any court in Hong Kong, while solicitors do not. Solicitors only have rights of audience which have been acquired by legislation or through usage of particular courts. Currently, solicitors have rights of audience in, inter alia, magistrates' courts and the District Court, and in chambers hearings in the Court of First Instance and the Court of Appeal.

Consultation Paper on Legal Services

3. In March 1995, the then Attorney General's Chambers (AGC) published the "Consultation Paper on Legal Services" for public consultation and one of the recommendations made in the Consultation Paper was -

".....it should be possible for solicitors to acquire rights of audience in all courts under statutory provisions similar to those in England and Wales."

4. While a vast majority of the written submissions responding to the consultation paper in general expressed support for the proposal of extending solicitors' rights of audience, the Hong Kong Bar Association (the Bar Association) objected to it. In view of the Bar Association's objection, the Administration conducted a further study of the state of the Bar in other common law jurisdictions where solicitors could acquire full rights of audience. The Administration also commissioned the City University of Hong Kong to conduct an opinion survey on the issue of granting higher rights of audience to solicitors. The survey showed that a majority of the respondents agreed to the extension of solicitors' rights of audience.

5. The Report on "Public Opinion Survey on Extension of Solicitors' Rights of Audience" and the Report on "The State of the Bar in Various Commonwealth Jurisdictions" were submitted to the Panel on Administration of Justice and Legal Services (the AJLS Panel) at its meeting on 8 July 1996. Some members of the Panel at that time shared the concern of the Bar Association about the possible negative impact of the proposed extension of solicitors' rights of audience on the Bar. They also considered that it might be too early to draw conclusion from the experience in England in view of the small number of solicitor advocates who obtained higher rights of audience there. Notwithstanding the reservations expressed by the Bar Association and some members of the Panel, the Administration had considered moving Committee Stage amendments (CSAs) to the Legal Services Legislation (Miscellaneous Amendments) Bill 1996, which was going through the legislative process of consideration by the Legislative Council (LegCo) at that time, to extend the rights of audience of solicitors. However, the President of LegCo subsequently gave a ruling that the proposed amendments exceeded the scope of the Bill and might not be proposed to the Bill.

Working Party on Solicitors' Rights of Audience

6. In June 2004, the Chief Justice (CJ) established a Working Party on Solicitors' Rights of Audience (the Working Party) under the chairmanship of Hon Mr Justice Bokhary, Permanent Judge of the Court of Final Appeal (CFA). Other members of the Working Party comprised four other judges, a Law Officer from the Department of Justice (DoJ), two barristers, two solicitors and a lay member not connected with the practice of law. The Working Party's terms of reference was to consider whether solicitors' existing rights of audience should be extended and if so, the mechanism for dealing with the grant of extended rights of audience to solicitors.

7. In June 2006, the Working Party issued the "Consultation Paper on Solicitors' Rights of Audience" for public consultation. An overwhelming majority of the responses to the consultation paper favoured extending higher rights of audience to suitably qualified solicitors. The Final Report of the Working Party (the Final Report) was published in October 2007. The Working Party recommended that legislation should be enacted to provide the necessary framework for the granting of higher rights of audience to solicitors. CJ had accepted the Working Party's recommendations and requested the Administration to take forward the matter by appropriate legislation.

The Bill

8. The objects of the Bill are to amend the Legal Practitioners Ordinance (Cap. 159) (LPO) to implement the scheme proposed by the Working Party for granting higher rights of audience to solicitors before the High Court (HC) and CFA in civil and criminal proceedings. A new Part IIIB is added to LPO to provide for the necessary legal framework. Under the proposed section 2(1) of the Bill, a

solicitor advocate is defined as "a person who has higher rights of audience under Part IIIB".

The Bills Committee

9. At the House Committee meeting on 26 June 2009, Members formed a Bills Committee to study the Bill. The membership list of the Bills Committee is in **the Appendix**.

10. Under the chairmanship of Dr Hon Margaret NG, the Bills Committee has held four meetings with the Administration. Representatives from the Bar Association, the Law Society of Hong Kong (the Law Society) and the Consumer Council have participated in the deliberations of the Bills Committee.

Deliberations of the Bills Committee

Impact of the Bill on the barristers profession

11. The Bills Committee notes that the two legal professional bodies agree with the main proposals in the Bill. Some members including Mr Abraham SHEK, Mr Ronny TONG and Dr Priscilla LEUNG, however, have expressed concerns about the impact of the Bill on the barristers' profession, particularly in respect of junior members of the Bar, and on the standard of advocacy before the courts. It is the position of the Bar Association that it has accepted the proposals in the Bill for the sake of public interest, notwithstanding the adverse effect on the prospects of young barristers. The Bar Association believes that new entrants with aspiration for advocacy work will still choose to join the barrister profession. The Bar Association has also set up Bar Scholarships to encourage bright law graduates to join the Bar by providing them with financial incentive and/or assistance during pupillage.

12. The Bills Committee notes that under the proposed scheme, the Higher Rights Assessment Board (the Assessment Board), comprising mainly senior members of the legal profession, will act as the gatekeeper of the standard of advocacy before the courts. Members have agreed that there is a need to review the proposed scheme at an appropriate junction, say around two years after its implementation. Members have further agreed that the issue should be referred to the AJLS Panel for follow-up.

The Assessment Board

(Proposed new sections 39E, 39F, 39G, 73CA and 73CB)

13. The Assessment Board is established to determine applications by solicitors for higher rights of audience. It comprises members appointed by CJ from serving and former judges, members of the legal profession and an officer of DoJ, as well as a lay member to be selected by the chairperson of the Assessment Board from among a panel of lay persons appointed by CJ. The Assessment Board may delegate to its

committees its powers and duties in relation to any interview required to be attended by an applicant for higher rights of audience. Provisions are made for the terms of office, resignation or removal of a Board member and its proceedings.

14. The Assessment Board, rather than the Council of the Law Society (the Council) as originally proposed when the Administration briefed the AJLS Panel in December 2008, will make rules to deal with various matters including those relating to any courses or training or assessments or examinations required to be completed or passed by an applicant for higher rights of audience (the Assessment Board Rules). Such change has been made as it is considered more desirable to vest in the same body the powers to prescribe rules on both the criteria for assessment and the training/course required to be completed for meeting the specified criteria.

15. The six-year and six-board Rules (the six-six Rules) have been stipulated in the general guidelines on appointments to public sector advisory and statutory bodies (ASBs) issued to appointing authorities for reference. The six-year Rule means that a non-official member of any ASB should not serve for more than six years in any one capacity. The six-board Rule means that a person should not serve as a member on more than six ASBs at the same time. Some members including Mr LAU Kong-wah and Mr Paul TSE have expressed the view that the six-six Rules should also apply to the appointment of the Assessment Board. Dr Margaret NG, however, considers that while the application of the six-six Rules poses no problem as a matter of policy, its inclusion in the law will leave no room for any flexibility in appointment.

16. The Administration has explained that it has not proposed to apply the six-six Rules to the Assessment Board for the following reasons -

- (a) except possibly in relation to the panel of lay members under the proposed new section 39E(5), the pool of persons who are eligible for appointment to the Board is quite small and there can be practical difficulties in identifying sufficient volunteers to fill all the positions if they are bound by the strict requirements of the six-year Rule that they can only serve two terms;
- (b) with regard to the appointments of Board members who are solicitors, Senior Counsel and representative of DoJ, CJ must consult the President of the Law Society, the Chairman of the Bar Council (to be amended to "the Chairman of the Hong Kong Bar Association" as elaborated in paragraph 24 below) and the Secretary for Justice under the proposed new section 39E(4). Those recommending authorities may have good reasons for recommending a particular nominee to serve more than two three-year terms; and
- (c) under the proposed new section 39E(3), the lay member will be selected by the chairperson of the Board from a panel of persons appointed by CJ. It will 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 will not be desirable to anticipate how the chairperson will make his or her selection and it will be best to avoid the inflexibility that will arise if the appointment to the panel cannot be for a period of longer than six years.

17. According to the Administration, the Judiciary has expressed agreement with the above reasons. It is considered best for CJ to develop his policy on the number of terms that a member can serve in the light of experience gained after the establishment of the Assessment Board and after taking into account the views of the chairperson and the nominating authorities.

18. The two legal professional bodies have advised the Bills Committee that they appreciate the need for flexibility and raise no objection to the Administration's proposal of not specifying in the Bill any restriction on the length of service for members of the Assessment Board. The Bills Committee notes from the Law Society that the Judiciary generally follows the six-year Rule in making appointments to ASBs dealing with legal matters.

19. Members in general agree that while as a matter of policy, the six-six Rules should be applicable to the Assessment Board, it will not be desirable to include in the Bill a restriction on the maximum length of service for members of the Assessment Board, so as to retain more flexibility in the hands of CJ to decide on the appointment.

20. The Administration has informed the Bills Committee that the proposed section 39E(3)(b)(v) requires the person who is selected by the chairperson from the panel of lay persons to join the Assessment Board to be appointed by CJ. Since the members of the panel are appointed by CJ under the proposed new section 39E(5), the Judiciary takes the view that the further appointment under the proposed new section 39E(3)(b)(v) by CJ is unnecessary. At the request of CJ, the Administration will introduce CSAs to remove such requirement to avoid the need for double appointment by CJ.

21. The Administration has also informed the Bills Committee that the Bill does not provide for the term of the members of the panel of lay persons. The Administration will introduce CSAs to provide that the members of the panel shall hold office for a term not exceeding three years but may be reappointed to align with the term of the members of the Assessment Board.

22. The legal adviser to the Bills Committee has observed that while the quorum of the Assessment Board under the proposed new section 39G(1) is seven members, it does not require the chairperson to be one of these seven members. Therefore, meetings of the Assessment Board may be held and decisions to be made without any serving or former judges. The legal adviser has suggested that the Administration should consider whether it is necessary to specify that the quorum of the Assessment Board must include the chairperson or an eligible-person member acting as the chairperson. Members consider that an express expression should be added to the Bill to plug any possible loophole as identified by the legal adviser.

23. The Administration has confirmed that there is no provision in the Bill specifying that another member can act as the chairperson in the absence of the latter. Dr Margaret NG has expressed the view that there should be a procedure for another person to chair a meeting in the absence of the chairperson. After consideration of members' views and consultation with the Judiciary, the Administration has agreed to move CSAs to the proposed new section 39G to provide that the quorum of the Assessment Board must include the chairperson or an eligible-person member and an eligible-person nominated by the chairperson should preside at a meeting in the absence of the chairperson.

24. At members' request, the Administration has agreed, after consultation with the Bar Association, to amend the term "the Chairman of the Bar Council" in the proposed new section 39E(4)(b) and the proposed new section 39F(4)(b) to "the Chairman of the Hong Kong Bar Association", so as to achieve consistency with the use of "the President of the (Law) Society" in the proposed new sections 39E(4)(a) and 39F(4)(a).

Application to the Assessment Board and eligibility requirements
(Proposed new sections 39H to 39J)

25. A solicitor who satisfies the eligibility requirements may apply to the Assessment Board for higher rights of audience, whether in respect of civil proceedings, criminal proceedings or both. The application must be in a form to be specified by the Assessment Board, and accompanied by supporting information and a prescribed fee. The Assessment Board must, in relation to each calendar year, specify one or more periods during which applications may be made.

26. According to the eligibility requirements stipulated in the proposed section 39I, the applicant has to have at least five years' post-qualification practice, of which at least two years must have been in Hong Kong during the period of seven years immediately before the date of application. Further, the applicant has to comply with requirements (e.g. completion of an approved advocacy course and passing of related assessments) to be prescribed by the Assessment Board Rules unless an exemption applies.

27. The two legal professional bodies have confirmed that they are in agreement with the proposed eligibility requirements. Mr Ronny TONG, however, has expressed concern that these eligibility requirements do not include experience in advocacy work before the courts which should be a critical factor of consideration in the grant of higher rights of audience. The two legal professional bodies have advised that advocacy encompasses the acts of speaking and writing in support of a position. The Working Party has recommended in its Final Report that the Assessment Board should be given a degree of latitude in determining the relevant advocacy experience of an applicant, taking into account the totality of his or her litigation and advocacy experience.

28. The Administration has explained that the eligibility requirements under the proposed new section 39I are the threshold requirements only. Apart from satisfying these threshold requirements, an applicant should also satisfy the conditions for granting applications set out under the proposed new section 39L, including experience and competence in litigation and advocacy, whether written or oral.

Determination of application by the Assessment Board

(Proposed new sections 39K to 39M and proposed new section 73CA)

29. The proposed new section 39K provides for the determination by the Assessment Board of an application, and requires the notification of its decision. The required timeframe for the determination and notification is "as soon as practicable". In response to members' enquiry, the Administration has confirmed that in respect of applications for higher rights of audience for both civil and criminal proceedings made under the proposed new section 39H(2)(c), its policy intent is to empower the Assessment Board to grant the applicants higher rights of audience for only civil proceedings or criminal proceedings or both. The Administration will introduce CSAs to add a new section 39K(1A) to make clear such policy intent. The Administration will also introduce consequential amendments to the proposed new section 39K(2)(a)(ii) and the proposed new section 39M(3) to provide that the Assessment Board must also give reasons for its decision made under the proposed new section 39K(1A)(b) to grant an application in part and, where an application is granted in part, the applicant must be given an opportunity to make representation.

30. The proposed new section 39L sets out the conditions for granting the application. The Assessment Board has to be satisfied, inter alia, that the applicant has acquired sufficient litigation experience within the period of three years immediately before the date of the application and is in all respects a suitable person. Pursuant to the proposed new section 73CA, detailed eligibility requirements and matters relating to the assessment of applications under the accreditation route and the exemption route will be governed by subsidiary legislation to be made by the Assessment Board, which will be subject to the scrutiny of LegCo.

31. The Assessment Board is empowered to, inter alia, make enquiries with the Council regarding eligibility and other requirements, and also to require the applicant to provide it with further information relating to the application at an interview before it or otherwise. If the application is proposed to be refused, the applicant must be given an opportunity to make representation.

32. In response to members' enquiry about the appeal mechanism in respect of applications for higher rights of audience, the Administration has advised that the proposed new section 73CA(2)(c)(i) provides that the Assessment Board may make rules on arrangements for appeal or review in respect of matters concerning assessments or examinations. A person who has failed in his or her application for higher rights of audience is not precluded from making another application in the following year and subsequent years.

33. Ms Miriam LAU has enquired as to whether the applicant concerned will be notified of the enquiries made by the Assessment Board with the Council concerning his or her eligibility under the proposed new section 39M(1)(a), and whether the details of the enquiries and the information provided by the Council will be conveyed to the applicant.

34. The Administration has advised that pursuant to the proposed new section 73CA(1)(a)(v), the Assessment Board is empowered to make rules to provide for the enquiries made under the proposed new section 39M(1)(a). It is envisaged that the rules to be made by the Assessment Board would, subject to the Assessment Board's own views, be likely to provide for the following minimum requirements -

- (a) a prior written consent from the applicant for release of information should be obtained. This can be done by asking the applicant to give consent in his or her application for higher rights of audience under the proposed section 39H(1);
- (b) both the request for and the provision of information shall be made on a confidential basis and in writing;
- (c) the Assessment Board shall inform the applicant when it requests his or her information from the Council; and
- (d) any information disclosed by the Council to the Assessment Board under the proposed section 39M(1)(a) will be disclosed to the applicant at the same time.

35. The Administration has further advised that while the Judiciary has pointed out that it is inappropriate to pre-empt the Assessment Board (which has not yet been formed) on this subject, it would have no objection for the Administration to suggest the above requirements to the Assessment Board when it is formed for its consideration.

36. The Law Society has explained to the Bills Committee that the most common enquiry is likely to be in respect of conduct matters and it is the firm view of the Council that only those cases which result in disciplinary action should be disclosed to the Assessment Board. Chapter 16 of the Hong Kong *Solicitors' Guide to Professional Conduct* lists the sanctions which can be imposed by the Law Society: "Letter of Regret", "Letter of Disapproval"/"Strong Letter of Disapproval" and finally a referral to the Convenor of the Solicitors Disciplinary Tribunal.

Higher rights of audience certificate

(Proposed new sections 39N, 39P to 39R and proposed amended section 73)

37. The proposed new section 39N makes it clear that on the granting of an application, the applicant has the higher rights of audience sought, and those rights will then be exercisable by the applicant as a solicitor. The Council, upon

notification, must issue a certificate in respect of higher rights of audience to the successful applicant. The Council is to maintain a register of those who are granted certificates, make it available for public inspection and provide the Registrar of HC with the names of such persons. The Council may make rules in order to deal with the issue of and other matters concerning higher rights of audience certificates. The Council is also empowered to issue a code of conduct for solicitor advocates, in consultation with CJ and the Council of the Bar Association.

38. The Consumer Council which is in support of the Bill has suggested that the list of persons with higher rights of audience to be kept by the Council should include further information such as specialized areas and year of admission of the solicitors. The Law Society has undertaken to consider positively the Consumer Council's suggestion. The Administration has expressed the view that while it might be desirable for potential clients to obtain the additional information concerning the solicitor advocates as suggested by the Consumer Council, it is not appropriate to require such information for the purposes of the Bill, as such information is not directly relevant to their accreditation as solicitors with higher rights of audience.

Cessation and re-acquisition of higher rights of audience
(Proposed new section 39O)

39. A solicitor who has been granted higher rights of audience ceases to have those rights on being adjudged bankrupt, or on ceasing to be on the roll of solicitors, or on being suspended from practice as a solicitor. The solicitor may re-acquire the rights in specified circumstances.

40. In response to members' enquiries about the arrangement for a solicitor to reacquire higher rights of audience, the Administration has advised that a person will reacquire his higher rights of audience automatically on fulfillment of the relevant conditions set out in the proposed new section 39O(2) as appropriate, i.e. the rights will be reacquired by operation of law and no procedure for reacquiring such rights will be required. Ms Miriam LAU has, however, expressed concern that while the proposed new section 39O(2)(a) stipulates to the effect that a person will automatically reacquire his or her higher rights of audience upon being discharged from bankruptcy, in reality that person has to apply to the Law Society to resume his or her practice as a solicitor before being able to exercise higher rights of audience again.

41. The Law Society has explained that for a solicitor who has been adjudged bankrupt, his or her practicing certificate will "automatically determine" pursuant to section 6(7) of LPO. The name of the bankrupt solicitor will not be struck off the Roll of Solicitors. Upon discharge a solicitor can make an application for a new practicing certificate.

Unlawful exercise of higher rights of audience

(Proposed new section 45A and proposed amended sections 50A and 51)

42. The proposed section 45A provides for a penalty for the unlawful exercise of higher rights of audience as a solicitor, and stipulates that any costs in respect of anything done by that person in purported exercise of those rights as a solicitor are not recoverable by any person. However, moneys paid by a solicitor for a client would not, by reason of the proposed section 45A, become irrecoverable by the solicitor in purported exercise of any higher rights of audience as a solicitor while not having those rights under the new Part IIIB, if those moneys would have been recoverable had the solicitor had those rights under that Part.

43. Some members have queried whether there is a need for imposing criminal sanction against purported exercise of higher rights of audience by a person not having such right under the proposed new section 45A on the grounds that it is the court's inherent jurisdiction to hold a person in contempt; there is no precedent found of a person being prosecuted for such act under the existing section 45(2)(a) and (c); and the matter can also be dealt with by the disciplinary proceedings of the Law Society. They are also concerned that under the proposed section 45A, a person who has purported to exercise higher rights of audience may be subject to double jeopardy, i.e. that person can be guilty of contempt of the court under subsection (a) and also liable to prosecution for an offence under subsection (c).

44. The Administration has given the following justifications for the proposed new section 45A -

- (a) the legal profession supports the need for imposing sanction against purported exercise of higher rights of audience;
- (b) when a person not having higher rights of audience holds himself or herself out to have such rights to represent members of the public before the court, it is not only an internal matter for the Law Society, but also a matter of public interest; and
- (c) while the act is an affront to the court in question which will be entitled to punish that person for contempt, it may not be detected until after that person has appeared before the court, in which case the sanction under the proposed new section 45A(c) can be invoked.

The Administration has assured members that if it has come to the attention of DoJ that a person has already been punished for contempt of the court for a certain act, it will certainly be a factor of consideration in deciding whether prosecution action should be taken in respect of the same act by that person.

45. Some members consider that the Chinese rendition of the word "purport" ("看來是") in the proposed new section 45A does not reflect fully the meaning of the

word in the context. After consideration, the Administration has agreed to adopt "其意是" as the Chinese rendition for the word and will move a CSA to such an effect.

Commencement of the Amendment Ordinance

46. The Law Society has expressed its hope that the Assessment Board will be convened within six months of the passage of the Bill and will be operational within six months thereafter. According to the Administration, the Judiciary has advised that on the assumption that the legislation would be brought into force in about six months after enactment, it is expected that the Assessment Board would become operational within one month thereafter. In this connection, barring unexpected circumstances, the Administration would expect the Board to be in a position to invite applications about 12 months after the enactment of the Bill.

Committee Stage amendments

47. Apart from the CSAs highlighted above, the Administration will also move minor and consequential amendments. The Bills Committee agrees to these CSAs to be moved by the Administration.

Date of resumption of Second Reading debate

48. The Bills Committee supports the resumption of the Second Reading debate on the Bill on 20 January 2010.

Consultation with the House Committee

49. The Bills Committee reported its deliberations to the House Committee on 8 January 2010.

Bills Committee on Legal Practitioners (Amendment) Bill 2009

Membership list

Chairman Dr Hon Margaret NG

Members Hon Albert HO Chun-yan
Hon LAU Kong-wah, JP
Hon Miriam LAU Kin-ye, GBS, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Ronny TONG Ka-wah, SC
Dr Hon Priscilla LEUNG Mei-fun
Hon Paul TSE Wai-chun

Total : 9 members

Clerk Miss Flora TAI

Legal Adviser Miss Winnie LO

Date 15 July 2009