

立法會
Legislative Council

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(These minutes have been seen
by the Administration and
cleared with the Chairman)

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Legislative Council
Bills Committee on Legal Practitioners (Amendment) Bill 1999

Minutes of the second meeting
held on Thursday, 17 February 2000 at 10:45 am
in Conference Room A of the Legislative Council Building

Members Present : Hon Margaret NG (Chairman)
Hon Albert HO Chun-yan
Hon Ronald ARCULLI, JP
Dr Hon LEONG Che-hung, JP
Hon Jasper TSANG Yok-sing, JP
Hon Ambrose LAU Hon-chuen, JP

Public Officers Attending : Mr Stephen WONG
Deputy Solicitor General

Mr Michael SCOTT
Senior Assistant Solicitor General

Mr W B MADDAFORD
Senior Assistant Law Draftsman

Miss Agnes CHEUNG
Senior Government Counsel

Ms Carmen CHU
Senior Government Counsel

Ms Kitty FUNG
Government Counsel

Attendance by Invitation : Representatives from the Law Society of Hong Kong

Mr Anthony CHOW
President

Mr Tony HARROD
Director of Compliance

Ms Belinda MACMAHON
Assistant Director of Regulation and Guidance

Mr Patrick MOSS
Secretary General

Representatives from the Hong Kong Bar Association

Mr Ambrose HO

Mr Anselmo REYES

Clerk in Attendance : Mrs Percy MA
Chief Assistant Secretary (2)3

Staff in Attendance : Ms Bernice WONG
Assistant Legal Adviser 1

Mr Paul WOO
Senior Assistant Secretary (2)3

Action
Column

I. Withdrawal of members

The Chairman informed the meeting that Mr James TO and Ms Emily LAU had withdrawn from the Bills Committee.

II. Meeting with representatives from the Law Society of Hong Kong (Law Society) and the Hong Kong Bar Association (Bar Association) (LC Papers Nos. CB(2)1089/99-00(02) and 1099/99-00(01) & (02))

2. The Chairman welcomed the representatives from the two legal professional bodies to the meeting and invited them to present their submissions on the Bill.

The Law Society

3. Mr Patrick MOSS briefed members on the views of the Law Society on the provisions in the Bill relating to solicitors. He said that the provisions largely reflected the proposals made by the Law Society in respect of the subject areas concerned. He explained the Law Society's stance as follows -

- (a) Clause 2 of the Bill served to clarify that all the partners in a "Hong Kong firm", irrespective of whether they were resident in Hong Kong, had to be solicitors enrolled on the roll of solicitors;
- (b) Clause 3 sought to provide for a "prosecutor" who would be a practising solicitor appointed by the Law Society to assist in the investigation of a complaint against a member of the Society, namely, summoning witnesses for the purpose of obtaining evidence to ascertain the full facts of the case before the case was to be referred to a Solicitors Disciplinary Tribunal (SDT). However, it was not intended that the prosecutor should have the power of imposing sanction on the persons failing to appear and answer questions put by the prosecutor;
- (c) Clause 4 enlarged the pool from whom members of a SDT could be appointed;
- (d) Clause 5 was to change the existing situation that only the respondent in a complaint case had the right to appeal against a decision of the SDT. The Law Society felt that it should also be entitled to the same right of appeal, although it was contemplated that such right would only be exercised very sparingly;
- (e) Clause 6 provided for a discretion of the Law Society to publish a summary of the finding and order of the SDT and the name of the solicitor involved. As the original intention of the Law Society was that the solicitor concerned should have a right to request that such information not to be published, the Society had agreed with the Administration that an amendment would be made to this clause to expressly set out such right; and
- (f) Clause 13 aimed at removing an existing loophole in the legislation by specifying that a solicitor who offered services as a practitioner of foreign law must satisfy the requirements set forth in section 7 of the Legal Practitioners Ordinance (LPO) concerning the taking out of professional indemnity insurance.

Mr MOSS added that the Law Society would like the above provisions in the Bill to be

enacted as soon as possible.

The Bar Association

4. Mr Ambrose HO explained the present position as to how to put in place the necessary arrangements for the implementation of the provisions affecting barristers upon the passage of the Bill.

Admission of barristers (proposed section 27(1) under clause 7)

5. Mr Ambrose HO said that with the coming into force of the new scheme for admission as barristers under the proposed section 27 of LPO, law students who got their qualification for admission in the United Kingdom (UK) would no longer be eligible to apply for admission to the local Bar on the basis of their overseas qualification. They would be required to satisfy additional requirements such as passing any examinations prescribed by the Bar Council. He said that the Bar Association was of the view that as a result of this legislative change, exemption should be provided to people who had already enrolled for the Bar vocational course in the UK for the year 2000/2001 so that they could have sufficient time to finish the course and then seek admission to the local Bar under the old route for admission upon their return to Hong Kong. To give effect to this, the Bar Association had proposed that a specific date should be specified in the Bill so that people who had obtained the qualification leading to admission as a barrister in the UK would be exempted from the new admission criteria, provided that they applied for admission to be called to the Bar in Hong Kong before that date. As presently envisaged by the Bar Council, the deadline for seeking admission under the above mechanism should be set at a date not earlier than 1 November 2001. This would enable people pursuing the Bar vocational course in UK in 2000/2001 to sit (and re-sit if necessary) the examinations before the deadline.

6. Mr Ambrose HO added that the Bar Council had also considered the justification for providing similar exemption to UK law students currently in their undergraduate years of study. The present thinking of the Bar Council was that upon implementation of the new admission system, these students would still have the option of doing the Postgraduate Certificate in Laws course (PCLL) in Hong Kong after finishing their Bachelor of Laws degree in the UK. On successful completion of the PCLL, they would then be qualified to gain admission as barristers in Hong Kong. Furthermore, the Bar Council had taken into account the fact that the system of laws in Hong Kong and UK differed in some remarkable aspects, for example as a result of the civil procedure reform which had taken place in England. This divergence might be widened in the course of time. Hence, the Bar Council considered that it might be desirable to have the new admission criteria, which required applicants to have undertaken the PCLL, implemented at the earliest opportune time. This would ensure that in future people admitted as barristers in Hong Kong had a sufficient knowledge of the legal system in the local context. Mr HO said that the Bar Council had yet to

come to a final decision on the matter in view of the need to balance all relevant considerations.

7. Mr Anselmo REYES then briefed members on the admission mechanism as presently contemplated by the Bar Association. He said that for people seeking admission through the PCLL route, upon completion of the PCLL, they should apply for a certificate of eligibility for pupillage. Having then completed the requisite period of pupillage, the person should apply to the Bar Council for a certificate of qualification for admission as a barrister. This should be followed by the serving of a notice of motion for admission in the High Court, and the Court then admitted the applicant as a barrister. For applications on the basis of overseas qualifications, an applicant, upon fulfilling the requisite period of practice as a barrister in a foreign jurisdiction, should apply for a certificate of eligibility as an overseas lawyer to the Bar Council. Having received the certificate, the applicant would be required to sit an examination, which would consist of a general and a special part, for the purpose of assessing the knowledge of the applicant in various different subjects. After passing both parts of the examination, the person then applied for a certificate of eligibility for pupillage, and went through the same process as in the situation of a person applying through the PCLL route. Mr REYES added that the Bar Council was now drafting the relevant subsidiary legislation required for implementing the new admission requirements.

8. Mr REYES further advised that a practising solicitor who wished to "switch over" to apply for admission as a barrister would also be required to undergo a period of pupillage. In practice, a solicitor with extensive advocacy experience could apply for reduction of the period of pupillage. In some cases, solicitors were admitted as barristers with a reduced pupillage of six months or a shorter period.

Ad hoc admissions (proposed section 27(4) under clause 7)

9. Mr Ambrose HO said that the Bar Association had proposed to the Administration that the Bill should spell out that ad hoc admittees should have substantial advocacy experience for the purpose of admission under proposed section 27(4).

Employed barristers (proposed section 31C under clause 12)

10. Mr Ambrose HO referred members to the Note on Employed Barristers submitted by the Bar Association (LC Paper No. CB(2)1099/99-00(01)). He said that the category of "employed barristers" was not new. Under the Code of Conduct of the Bar Association, an employed barrister was defined as "a barrister who is engaged to provide legal advice or services for his employer under a contract of employment". At present, an employed barrister was not allowed to instruct a practising barrister directly without the intermediary of a solicitor. Clause 12 sought to provide a statutory recognition of "employed barristers" as a distinct category of barristers

holding an employed barrister's certificate who could instruct a practising barrister directly for the limited purpose of obtaining a legal opinion on behalf of their employers. Mr HO clarified that by virtue of the restriction under proposed section 31C(4), an employed barrister could not instruct a practising barrister to engage in court proceedings.

11. Mr Ambrose HO also drew members' attention to the relevant extracts from the Code of Conduct on acceptance of instructions and the rules relating to direct professional access.

Savings provision (clause 16)

12. Mr Ambrose HO said that the Bar Association had proposed to amend clause 16 to clarify that the savings provision should also cover people who had gained admission to the Bar but had yet to become qualified to practise, i.e. those who had not yet completed pupillage.

Concerns raised at the meeting

"Hong Kong firm" (clause 2)

13. Mr Ronald ARCULLI enquired about how the amended definition of "Hong Kong firm", which repealed the reference to "resident in Hong Kong", would affect existing firms in Hong Kong.

14. In response, Mr Tony HARROD said that a solicitor who was not resident in Hong Kong could become a partner in a Hong Kong firm. He was not aware of any Hong Kong firm with non-resident partners who were not on the roll of solicitors. Hence, the new definition would not impinge on any existing firms in Hong Kong. He explained that the proposed amendment which clarified that all partners in a Hong Kong firm, regardless of whether they were resident in Hong Kong, had to be solicitors on the Hong Kong roll was intended to plug a legislative loophole which might result in a Hong Kong firm having non-resident partners who were not qualified solicitors. In actual situation, however, the loophole was more perceived than real.

Appointment and powers of a prosecutor (clause 3)

15. Mr Albert HO pointed out that under the proposed section 8AAA, it appeared that a prosecutor appointed by the Council of the Law Society could summon any other persons to give evidence in the investigation of a complaint even before a prima facie case was established. He queried the rationale for the provision of such power. The Chairman and Mr Ronald ARCULLI questioned whether it was appropriate to use the reference to "summon any person to appear", when in fact there would be no sanction for failure to comply with the summons. They asked the Law Society to clarify the scope of powers of a prosecutor under proposed section 8AAA.

16. In response to members' enquiries, Mr Patrick MOSS said that it was envisaged that a prosecutor would be appointed by the Council of the Law Society to look into a complaint only after an investigation committee of the Society was satisfied that a prima facie case for disciplinary action had been established. The prosecutor could, in accordance with procedural rules prescribed by the Council of the Society, order attendance of witnesses for the purpose of collecting evidence for the use of a SDT if necessary. He supplemented that although there was no sanction for refusing to answer questions put by a prosecutor, the powers available under proposed section 8AAA(3) should enable a prosecutor to perform his intended role in the majority of cases. Mr Anthony CHOW added that the purpose of section 8AAA was to enable the Law Society to assume a more proactive role in the investigation and prosecution of cases of professional misconduct of solicitors.

17. Mr Albert HO enquired about the system adopted by other self-regulating professional bodies concerning investigation of disciplinary matters.

18. Dr LEONG Che-hung informed the meeting that for the medical profession, disciplinary proceedings were a two-tier process. The first tier involved a preliminary investigation committee which, after determining that there was a prima facie case, referred the complaint in question to the full Medical Council for a final decision. The medical practitioner who was the subject of the finding of the Council was entitled to seek redress by way of a judicial review of the Council's decision.

19. Mr Albert HO and Mr Ronald ARCULLI opined that there should be a separation of roles and powers between an investigator and a prosecutor. Mr ARCULLI suggested that the powers proposed for a prosecutor could be transferred to an inspector appointed under existing section 8AA.

20. The Chairman requested the Law Society to elaborate in writing the following -

- (a) the meaning of "summon" and "any other persons" in proposed section 8AAA(3); and
- (b) the respective roles of a "prosecutor" under proposed section 8AAA and an "inspector" under existing section 8AA.

She also requested the Law Society to provide the relevant procedural rules referred to in the proposed section 8AAA(3) for members' reference.

21. Representatives from the Law Society agreed to reconsider the purpose and drafting of clause 3 in the light of members' views.

Right to appeal against a finding or order of a SDT to the Court of Appeal (Clause 5)

22. Mr Albert HO asked whether the Bar Council had a right to appeal against an order of a Barristers Disciplinary Tribunal. Mr Ambrose HO replied in the negative.

23. In reply to Mr Ronald ARCULLI's question, Mr Patrick MOSS said that the Law Society's request to be provided with a right to appeal against a decision of a SDT stemmed from some cases where the Society was firmly of the view that the finding of the SDT, which led to an acquittal of the solicitor concerned, was erroneous. Such cases had caused genuine concern to the Society as well as members of the public. The Society had come to the view that for the interests of the public to be adequately protected, it should be placed on a par with the respondent solicitors so far as the right to appeal was concerned. He said that at present, only the solicitors who felt aggrieved by a decision of the SDT had a right to appeal.

24. Mr Ronald ARCULLI pointed out that for appeals brought to the Court of Appeal, the proceedings would no longer be held in camera but in the open court. Hence, the identity of the solicitor who was the subject of the appeal would be exposed, regardless of whether the solicitor was found guilty or otherwise at the conclusion of the appeal. He said that this might do injustice to the solicitor concerned.

25. Mr Albert HO suggested that the proposed right of appeal to the Court of Appeal might be restricted by a requirement to first seek the leave of the Court of Appeal.

26. The Chairman requested the Law Society to advise the Bills Committee in writing on the following -

- (a) the circumstances under which the Law Society Council would exercise the right to appeal under clause 5;
- (b) whether such right would be subject to any limitations; and
- (c) whether similar power was given to legal professional bodies in other jurisdictions e.g. those in the UK.

(Post-meeting note - The Law Society's written response to the concerns raised at the meeting has been circulated vide LC Paper No. CB(2)1219/99-00(01)).

ALA 27. The Chairman also requested Assistant Legal Adviser (ALA) to provide information on the parties having the right to appeal to a court against the decision of a disciplinary body of other professional bodies.

(Post-meeting note - The information has been circulated to members vide LC Paper No. LS 91/99-00).

Admission of barristers (clause 7)

28. In answer to Mr TSANG Yok-sing's question, Mr Ambrose HO provided some statistics on admission to the Bar in Hong Kong for the years 1995 to 1999 (the statistics have been circulated vide LC Paper No. CB(2)1129/99-00(01) after the meeting). He pointed out that the number of admissions based on UK qualification had declined in recent years, falling from 41 in 1997 to 34 in 1998 and 18 in 1999.

29. Dr LEONG Che-hung reiterated his view that a lot of students embarking on legal studies in the UK acted on the expectation that they were entitled to gain admission to the local Bar directly after obtaining the UK qualification for admission. He was concerned that the proposed deadline of November 2001 for admission of barristers under the existing route might not be adequate to cater for the interests of these law students.

30. The Chairman said that the new admission mechanism practically required that most, if not all, applicants to seek admission through the PCLL route. This would put pressure on the capacity of the PCLL courses currently run by The University of Hong Kong and The City University of Hong Kong because of the increased demand from both local students and overseas returnees. She opined that the parties concerned should look carefully into the matter and be prepared to deal with any problems that might occur.

31. Representatives from the Bar Association noted the concern of members. Mr Anselmo REYES advised that a comprehensive review on legal education and training in Hong Kong initiated by the two legal professional bodies and supported by the Administration and the two universities was being conducted. This review would look into the matter of PCLL courses as one of the major issues to be examined.

32. On the matter of transitional provisions, Mr Anselmo REYES said that the Bar Association tended to think that the proposed arrangement to set a reasonable deadline for people with the relevant overseas qualification to apply to be admitted to the Bar in Hong Kong under the existing admission criteria was an appropriate measure. Such arrangement would also not contradict the GATS requirements.

33. Mr Ronald ARCULLI asked whether the principle of reciprocity inherent in the GATS standards had been observed by other jurisdictions. Mr Anselmo REYES replied that there had been quite a number of Hong Kong lawyers who were able to practise in other jurisdictions such as the UK. He understood that some Hong Kong law students had sat the Bar vocational examinations in other jurisdictions like New York in the United States. He pointed out that local practitioners were allowed to practise overseas not on the basis of their Hong Kong qualification as such but subject to other policy considerations as well, such as policies relating to employment and immigration control in the jurisdictions concerned.

34. In response to Mr TSANG Yok-sing, Mr Ambrose HO said that a person

embarking on the Bar vocational course in England in September 2000 was expected to complete all the examinations required for admission to the UK Bar by June 2001. Re-sitting the examinations, if necessary, would take place some time before November 2001. Hence, the Bar Council was looking at an effective date of not earlier than November 2001 for the new requirements for admission to the local Bar to come into force. He added that if undergraduate students were to be exempted from the new requirements as well, the commencement date would need to be put off further.

Ad hoc admissions

35. Mr Albert HO enquired whether barristers from civil law jurisdictions could be admitted under the proposed section 27(4) for the purpose of any particular case or cases. He also asked whether a legal expert practising Chinese law in the Mainland of China could be admitted under proposed section 27(4) to address the local Court on the interpretation of the Basic Law.

36. Mr Anselmo REYES considered that pursuant to the spirit of GATS, it was possible for a barrister from any jurisdiction to be admitted for the purpose specified in proposed section 27(4), provided that the person had the requisite qualifications and advocacy experience. He said that there were elements of interface between the Mainland law and the Hong Kong law, and it would be to Hong Kong's benefit if lawyers in the Mainland with the required competence and experience could be admitted in Hong Kong for the purpose of cases that demanded such expertise. He said that ultimately each application for ad hoc admission would be considered on a case-by-case basis by the Court.

Employed barristers (clause 12)

37. Mr Anthony CHOW noted that, as mentioned in the Bar Association's paper (LC Paper No. CB(2)1099/99-00(01)), there was no recognized professional body for employed barristers because they were simply a class of members of the Association. He asked whether the Bar Association would make rules to regulate the conduct of employed barristers regarding obtaining legal advice from a practising barrister directly without the intervention of a solicitor.

38. In reply, Mr Ambrose HO said that employed barristers, like other barristers, were subject to the Code of Conduct of the Bar Association and the jurisdiction of a Barristers Disciplinary Tribunal. As employed barristers were members of the Bar Association, the approach to negotiate standard terms of engagement on direct access for legal advice by members of recognized professional institutions could not apply to instructions from employed barristers. He said that the Bar Association would consider whether there was a necessity to promulgate rules specifically for the regulation of direct instructions from employed barristers.

39. Mr Patrick MOSS asked what would be the length of the "prescribed qualifying period of active practice" in proposed section 31C(2)(b) for the purpose of application to the Bar Council for an employed barrister's certificate. He pointed out that the period of solicitor traineeship was two years.

40. Mr Ambrose HO replied that as presently envisaged by the Bar Council, the prescribed period of active practice would be 12 months, i.e. the requisite period of pupillage which qualified a barrister to be able to practise. Mr Anselmo REYES supplemented that the Bar Council was of the view that the requirement of 12 months' active practice on the part of an employed barrister was sufficient for the limited purpose of direct instruction of a practising barrister for the seeking of a legal opinion only.

41. On clause 12, the Chairman said that the Law Society was welcomed to provide further views for the consideration of the Bills Committee.

Power of Bar Council to make rules (clause 15)

42. ALA pointed out that the power of the Bar Council to make rules under proposed section 72AA appeared to duplicate the rule-making power of the Chief Justice (CJ) under section 72 and 72A. She sought the Bar Association's views on this.

43. Mr Anselmo REYES responded that although there was some overlapping in the power to be exercised by the Bar Council and the CJ, the powers were not strictly identical. He said that he understood that the proposed section 72AA dealt with power of the Bar Council to make rules subject to the CJ's prior approval. Therefore, in practice, it was unlikely that the rules made by the two would be in conflict with each other.

Amendments to the Bill intended to be moved by the Administration

44. Government Counsel informed members that having consulted the two legal professional bodies, the Administration had been working on certain Committee Stage amendments (CSAs) to be introduced to the Bill. She briefly explained to members the tentative proposals which were set out in the Administration's letter to the Bills Committee (LC Paper No. CB(2)967/99-00(01)).

45. The Chairman advised that the proposed amendments would be discussed in detail at the next meeting. She requested the Administration to provide the draft CSAs for the Bills Committee's consideration as soon as possible.

Adm

(Post-meeting note - A set of draft CSAs proposed by the Administration has been circulated vide LC Paper No. CB(2)1183/99-00(02)).

III. Date of next meeting

46. The next meeting was scheduled for 28 February 2000 at 8:30 am.

47. The meeting ended at 12:45 pm.

Legislative Council Secretariat

22 June 2000