

立法會
Legislative Council

LC Paper No. CB(2)2550/99-00
(These minutes have been seen
by the Administration and
cleared with the Chairman)

Ref : CB2/BC/28/98

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

Minutes of the fifth meeting
held on Friday, 31 March 2000 at 10:45 am
in Conference Room B of the Legislative Council Building

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

Member Absent : Hon Ronald ARCULLI, JP

Public Officers Attending : 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

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. Matters arising

(LC Paper Nos. CB(2)1219/99-00(01) and 1544/99-00(01) - Letters from the Law Society of Hong Kong; and
LC Paper Nos. CB(2)1514/99-00(03) and (04) - Letters from the Administration)

Appointment and powers of a prosecutor (proposed section 8AAA under clause 3)

Members noted that the Administration had consulted the Law Society on the proposed section 8AAA in the light of the comments expressed by the Bills Committee. As a result, the Administration proposed to introduce a revised draft Committee Stage amendment (CSA) to clause 3 (a set of revised draft CSAs was attached in Annex A of the Administration's letter - LC Paper No. CB(2)1514/99-00(04)) which provided that an inspector appointed by the Law Society under the existing section 8AA would be given additional powers to question -

- (a) persons who were members or employees of law firms at the relevant time in accordance with procedural rules prescribed by the Council of the Society; and
- (b) third parties upon authorization of the Council of the Society.

There was no longer any provision for the appointment of "prosecutor" in clause 3. Under the revised draft CSA, the newly proposed section 8AAA set out the above-mentioned additional powers of an inspector.

2. The Chairman noted that under the newly proposed section 8AAA(3), an inspector might, in accordance with procedural rules prescribed by the Council, question the relevant persons. She drew members' attention to a letter dated 26 February 2000 from the Law Society (previously circulated vide LC Paper No. CB(2)1219/99-00(01)). In the letter, the Law Society had advised that "the rules have not yet been drafted but it is anticipated that they will contain provision that the power to question 'any other person' shall only be exercised by an inspector on the specific instructions of the Council of the Law Society." She sought the Administration's clarification in this respect.

3. The Administration explained that it was intended that the proposed power of

the inspector to question any other person should be exercised in accordance with the procedural rules prescribed by the Council of the Law Society. The procedural rules would be in the form of subsidiary legislation subject to the Chief Justice's prior approval in principle and the scrutiny of the Legislative Council.

4. The Chairman pointed out that it had been spelt out in the revised section 8AAA as proposed in the draft CSA that where authorized by the Council, the inspector could question any other person. As such, she questioned whether the expression "in accordance with procedural rules prescribed by the Council" was necessary. To avoid unnecessary complications, she requested the Administration to consider whether the expression "in accordance with procedural rules prescribed by the Council" could be removed.

Adm

5. The Chairman also drew members' attention to proposed section 8AAA(2) in the draft CSA, which stated that -

"The Council may direct an inspector to assist it in gathering evidence in respect of a matter the Council is considering for the purpose of deciding whether or not it should be submitted to the Tribunal Convenor of the Solicitors Disciplinary Tribunal Panel."

The Law Society had proposed to replace the word "should" with "might". The Chairman said that ultimately it was the Council of the Law Society which decided whether a matter should be referred to the SDT. In her opinion, the use of the word "should" was more appropriate. Members shared her view.

Right to appeal of the Council of the Law Society against an order made by a Solicitors Disciplinary Tribunal (SDT) (proposed section 13(2A) under clause 5)

6. Members noted from the Administration's letter (LC Paper No. CB(2)1514/99-00(04)) that section 48 of the UK Solicitors Act 1957 provided for a right of appeal against orders of the disciplinary committee and section 49 of the Solicitors Act 1974, which was a consolidating Act, provided for a right of appeal from the Solicitors Disciplinary Tribunal. One significant change made by the 1974 Act being the Tribunal took over the functions of the disciplinary committee. In Northern Territory of Australia, under the Legal Practitioners Act, there was no apparent restriction against the relevant Law Society being an applicant in an appeal application. In New South Wales, Australia, the Legal Profession Act 1987 provided that a party to the proceedings in a Tribunal could appeal against an order or decision made by the Tribunal to the Administrative Appeals Tribunal. In New Zealand, the Law Practitioners Act 1982 provided that the District Council (i.e. the Council of a District Law Society) might appeal to the court from an order or decision of the District Disciplinary Tribunal.

7. The Administration informed members that the Law Society had conceded that

the proposed right to appeal should be restricted by a requirement to first seek the leave of the Court of Appeal. The draft CSA to clause 5(b) in respect of proposed section 13(2A) had specified such requirement.

8. In reply to the Chairman, Senior Government Counsel said that there was no mention in the legislation in Australia and New Zealand of the prerequisite of leave of the court in connection with the exercise of a right to appeal of the relevant Law Societies in those jurisdictions.

9. The Chairman opined that there had to be sufficient reasons to justify the need to change the law to provide for the right to appeal of the Council of the Law Society, no matter how sparingly such right might be exercised. Mr Albert HO pointed out that it appeared that no other professional self-regulating bodies had similar right to appeal against a decision made by the relevant disciplinary committee or tribunal.

10. Dr LEONG Che-hung advised that unlike the legal profession, the medical profession had no separate disciplinary tribunal. As the Medical Council itself adjudicated in disciplinary proceedings, the question of right to appeal did not come into play.

11. Senior Assistant Solicitor General (SASG) said that the Law Society was of the view that it should be given a residual right to appeal in situations where it firmly believed that a decision of a SDT was perverse so that the decision might be corrected. The Law Society had also pointed out that the right to appeal was intended to be exercised only in respect of the most perverse decisions made by SDTs. In the end, whether or not an appeal by the Council would be allowed by the Court of Appeal would depend on the merits of the case. From the point of view of the Administration, there were valid arguments on public interest ground for a right of appeal to be exercised by the Law Society in the exceptional circumstances where for some reasons a SDT might have made a wrong judgment. He added that should other self-regulating bodies such as the Bar Association seek a similar statutory right, the proposal would also be seriously considered by the Administration.

12. Dr LEONG Che-hung enquired about the rationale for first seeking the leave of the Court of Appeal as a prerequisite for the right to appeal of the Law Society Council.

13. Senior Assistant Law Draftsman responded that the requirement for leave of the Court was to ensure that an appeal to a higher court would only be granted on a point of law rather than on a point of fact, i.e. on the basis of whether the law had been correctly applied in the previous decision made by the SDT. The requirement was seen as a mechanism to avoid waste of court's time resulting from unmeritorious appeals. The Chairman added that at the granting of leave stage, it would be a matter for the Court of Appeal to consider whether an appeal, if allowed, would apparently cause injustice or unfairness to the solicitor concerned.

14. Mr Ambrose LAU supported that a right to appeal should be provided to the Law Society as similar right was available in some other common law jurisdictions. He added that this would also improve public perception of the legal profession in that the Law Society was seen to be committed to regulating professional conduct of its members in a proactive manner. He considered that the requirement for the leave of the Court of Appeal for an appeal to be allowed should be a sufficient safeguard against possible abuse or oppression against the solicitors whose conduct was the subject of an disciplinary inquiry.

15. Mr TSANG Yok-sing and Dr LEONG Che-hung opined that the proposed appeal mechanism with leave of the Court was acceptable.

Clerk

16. Mr Albert HO said that according to the Law Society, the right to appeal was proposed on the ground that there had been decisions of SDTs which the Law Society considered were perverse. He suggested to ask the Law Society to provide some examples of perverse decisions of SDTs for the Bills Committee's consideration. The Chairman requested the Secretariat to write to the Law Society for such information.

Adm

17. The Chairman also requested the Administration to review, as a matter of drafting, the use of the expression "Where the Council is not satisfied with an order made by a Solicitors Disciplinary Tribunal, it may appeal the order" in proposed section 13(2A). She suggested to substitute it with "The Council may, with leave of the Court of Appeal, appeal an order of a Solicitors Disciplinary Tribunal". The Administration agreed to consider the suggestion.

Exemption of Bachelor of Laws (LLB) students from the new criteria for admission as barristers (clause 7)

Adm

18. SASG informed members that the Administration would revert to the Bills Committee after a settled view was reached, in consultation with the Bar Association, on the appropriate transitional provisions for the implementation of the new admission criteria for admission as barristers as proposed in clause 7.

19. Members took note of the information provided in the Administration's letter (LC Paper No. CB(2)1514/99-00(03)) on the estimated number of external LLB students in Hong Kong (2 698 in total) and the number of Hong Kong students studying LLB in the UK (a total of 150 to date). The Administration had received three replies from eight of the bar vocational course institutions which advised that they did not have external LLB students who had enrolled in the bar vocational course in the past three years. External LLB students were admitted to the bar vocational course according to the same criteria as any other candidate based on merit.

20. Dr LEONG Che-hung reiterated that external LLB students in Hong Kong and students studying LLB in the UK should be considered on equal footing in the question

of transitional arrangements for law students under the new admission criteria.

Meaning of "has resided in Hong Kong" in proposed section 27(2)

21. Members noted the case law relevant to the expression "has resided in Hong Kong" as quoted in the Administration's letter. In short, the interpretation was that while each case was dependent on its own facts, it appeared that absences on travel or business would not necessarily deprive an applicant of the status of having "resided in Hong Kong".

Definition of "Hong Kong firm"

22. The Administration clarified that by definition, a solicitor was a person who was on the Roll and was not suspended. A solicitor who was suspended from practice could not be a partner of a solicitors' firm. In the case of a solicitors' firm where one of the partners had been suspended, the remaining partners would continue to be a "Hong Kong firm".

Proposed repeal of section 27A

23. The Administration said that it had concluded that the existing section 27A should be repealed. It was in the process of consulting the affected counsel in the Department of Justice and the Bar Association on the appropriate transitional arrangements for the repeal.

II. To continue with clause-by-clause examination of the Bill

24. Members proceeded with clause-by-clause examination of the Bill, making reference to the draft CSAs in Annex A of LC Paper No. CB(2)1514/99-00(04) as appropriate.

Clause 11

25. Assistant Legal Adviser (ALA) pointed out that even though proposed section 31C sought to create a new category of employed barristers holding an employed barrister's certificate, the policy of clause 12 was to prohibit an employed barrister from practising as a practising barrister, regardless of whether he held a current employed barrister's certificate. She suggested that the Administration might consider amending proposed section 31(1)(f) in clause 11(c) from "if he holds a current employed barrister's certificate" to "if he is an employed barrister". The Chairman requested the Administration to consider whether a CSA was necessary in view of ALA's suggestion.

Adm

Clause 12

26. The Chairman pointed out that the Law Society had expressed the view that it did not oppose to the proposed section 31C if the purpose of the section was restricted only to the obtaining of a legal opinion from a practising barrister by an employed barrister as defined under the section. However, the Law Society was concerned as to how the Bar Association could ensure that such role of an employed barrister would not be abused.

27. ALA said that Article 50 of the Bar Association's Code of Conduct (previously circulated vide LC Paper No. CB(2)1099/99-00(02)) contained provisions which regulated acceptance of instructions of barristers. It specified that a barrister might not act in a professional capacity except upon the instructions of a solicitor or the Director of Legal Aid or the Government. Furthermore, subject to the Direct Professional Access Rules of the Bar Association, a barrister might accept instructions from a member of a "recognized professional body" without the intervention of a solicitor in matters which fell within the professional expertise of the recognized professional body. In her opinion, in respect of direct access to practising barristers, clause 12 of the Bill was clear in reflecting the legislative intent that an employed barrister could not instruct a practising barrister directly to obtain a legal opinion unless he had satisfied the requirement specified in proposed section 31C(4), namely he was an employed barrister in possession of an employed barrister's certificate.

28. The Chairman also pointed out that the Administration had proposed to add a new section 31C(3A) by way of a draft CSA to clause 12, which stated that -

"The publication in the Gazette by the Bar Council of a list of the names and addresses of those barristers who have obtained employed barrister's certificates for the period therein stated shall be prima facie evidence that each person named therein is the holder of such a certificate for the period specified in such list, and the absence from any such list of the name of any person shall be prima facie evidence that the person does not hold such a certificate."

The Chairman considered that proposed section 31C(3A) coupled with proposed section 31C(4) would be sufficient to address the Law Society's concern.

Section 31B

29. Incidental to the scrutiny of provisions concerning qualifications for practising as barrister, Dr LEONG Che-hung requested the Administration to clarify how section 31B on status of visiting Queen's Counsel operated in relation to a Counsel in another jurisdiction whose title was not formally known as "Queen's Counsel" but whose status and qualifications equalled that of a Queen's Counsel.

Adm

Clause 15

30. Members noted that the Administration had proposed a draft CSA to introduce a new section 72AAA which clarified that in case of conflict between rules made by the Chief Justice (CJ) and the Bar Council, the rules made by the CJ should be given precedence.

Adm

31. Mr Ambrose LAU suggested to delete the word "direct" before "conflict" in the newly proposed section 72AAA. The Administration agreed to consider the proposal.

Adm

32. The Chairman said that the Code of Conduct (the Code) of the Bar Association regulated the professional practice of barristers in respect of matters within the self-autonomy of the Bar Association. However, the Code was not subsidiary legislation and hence did not have the force of law. She requested the Administration to explain how the proposed rule-making power of the Bar Association conferred under clause 15 might affect the Bar Association's decision to effect changes to its rules, e.g. either by way of introducing subsidiary legislation or through amendments to its Code.

Clause 16

33. The Administration explained that the draft CSA proposed for clause 16 was to make it clear that notwithstanding the repeal of sections 27(1)(a)(i), (ii) and (v), persons who were already admitted as barristers under these subsections would not cease to be barristers in Hong Kong because of such repeal.

III. Next meeting

34. The next meeting was scheduled for 13 April 2000 at 8:30 am.

(Post-meeting note - The next meeting was subsequently rescheduled for 20 May 2000 at 9:00 am.)

35. The meeting ended at 12:45 pm.

(Post-meeting note - The Administration's responses to the issues raised at the meeting have been circulated vide LC Paper Nos. CB(2)1658/99-00(02) and 1958/99-00(02))