

香港律師會的信頭

Letterhead of THE LAW SOCIETY OF HONG KONG

Our Ref : SG/FA/1141
Your Ref : CB2/BC/28/98
Direct Line :

26th February 2000

by fax and post
(fax no. 2509 9055)

Mrs. Percy Ma,
Clerk to Bills Committee,
Legislative Council,
Legislative Council Building,
8 Jackson Road, Central,
Hong Kong.

Dear Mrs. Ma,

Re : Bills Committee on Legal Practitioners (Amendment) Bill

Thank you for your letter dated 18 February. I would like to comment on the points raised by you as follows:

(a) **Proposed section 8AAA**

- (i) The Law Society has listened carefully to comments made by some members of the Bills Committee and readily accepts that the proposal to authorise a prosecutor to “summon” a third person before him could well lead to a blurring of the distinction between the investigatory and quasi-judicial processes. We are content that the proposal should be amended in such a way that an inspector should be permitted to question any other person.

In the light of extensive experience in investigations under the Ordinance the Law Society considers that the current proposal is a logical and necessary adjunct to the powers of an inspector under section 8AA. The existing powers have proved to be an effective investigative tool for a proactive regulatory body but (other than for those inspections conducted at a court or place of detention and where a third party is present) they do not assist in obtaining

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information from former members or employees of solicitors' firms or from third parties who have information germane to the investigation. For example a solicitor who is under investigation may return the file to the client and then argue that he is unable to produce the papers relating to the matter under investigation because the file is no longer in his possession. The solution is not to refer the matter at that stage to the Tribunal because at the time that the investigatory process is underway a tribunal has not been convened. The intention is to exercise the power through an inspector whose role is to investigate whether there is a case to refer to the Solicitors Disciplinary Tribunal Panel Convenor. Once the evidence has been obtained a prosecutor will be appointed and the papers served on the Tribunal. It is obviously highly desirable that in most cases the necessary evidence has been obtained before the case proceeds.

It is not proposed that there should be any sanction against a person who declines to answer questions. Members of the Bills Committee have asked what is the purpose of enabling an inspector/prosecutor to summon a potential witness if that summons cannot be enforced. The purpose of the proposal is to give statutory acknowledgement that the inspector may question a potential witness but goes no further than that. It would be of considerable assistance in the investigation process if an inspector were to be able to say to a potential witness that he is authorised by the Ordinance to make enquiries. If the potential witness declined to answer then the inspector may inform him that the matter may be referred to the Tribunal which can require attendance and compel a witness to answer. Clearly in those circumstances the inspector could not take the matter further but it would at least enable him to "establish his credentials" and make known to the potential witness the seriousness of the position. The prosecutor could then be informed when appointed that there was a witness who had declined to assist and could then form a better judgment as to whether to proceed with the case.

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An inability to complete an investigation because a potential witness cannot be questioned may well lead to a dismissal of an otherwise well founded complaint. That cannot be in the public interest.

- (ii) “Any other persons” would in practice be limited to any one able to assist in an investigation i.e. any person connected with a serious breach of the rules of the profession. It is not unknown for third parties to be called as witnesses before a Disciplinary Tribunal but it is often difficult for the prosecutor to give a firm opinion whether or not to proceed when the evidence of potential witnesses cannot be obtained through an inability to question them. It would generally be imprudent to proceed without knowing what the witness is going to say and often too late if it is left to the Tribunal to issue a summons during the course of the hearing.
- (iii) In view of the Law Society’s acceptance of the comments made by Bills Committee members that there should not be a confusion of the roles of prosecutor and inspector and the suggestion that the proposal should refer to an inspector and not a prosecutor it is perhaps unnecessary to set out the distinction.
- (iv) 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.

(b) **Proposed section 13 (2A)**

As was mentioned at the Bills Committee meeting there have been within the last 12 months or so several decisions by Solicitors Disciplinary Tribunals which have caused concern to the Council because they appear to have been perverse. It is the Council’s view that these decisions did not do justice to the complainant or uphold the public interest. As members are aware the Solicitors Disciplinary Tribunal panel is appointed by the Chief Justice and is independent of the Law Society.

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We are aware that in England & Wales there is an unfettered power for the Law Society to appeal against a Disciplinary Tribunal decision.

Proposed section 31C

The Law Society does have concerns over the proposed section 31C under which the category of employed barristers will be created. We are satisfied that the draft Bill does reflect what had been agreed earlier but we do not wholly understand the submissions made by the Bar Association in its paper CB (2) 1099/99-00(01). In paragraph 2 of that paper reference is made to s. 45 (1) of the Ordinance as the rationale for creating a category of employed barristers. The suggestion is that an employed barrister might be in breach of s.45 (1) if he instructed a practising barrister direct. However s. 45 (1) states as follows:

A person who, by virtue of section 7, is not qualified to act as a solicitor, shall not act as a solicitor, or as such sue out any writ or process, or commence, carry on or defend any action, suit or other proceeding, in the name of any other person or in his own name, in any court of civil or criminal jurisdiction or act as a solicitor in any cause or matter, civil or criminal, to be heard or determined before any court, magistrate or justice.

In the context of employed barristers having the right only to obtain a legal opinion under the proposed section 31C we do not understand the reference to s.45(1) or the concerns which the Bar has over possible breaches of s. 45 (1).

The Bar's Code of Conduct relating to direct access casts upon the relevant professional body seeking access to a practising barrister the sole responsibility for enforcing the arrangements made between that professional body and the Bar. However, in relation to employed barristers there is no other professional body to whom compliance can be delegated. Since the limitation on what an employed barrister may do is contained in the proposed s.31C rules relating to compliance with that section should be set out in subsidiary legislation and not in a Code of Conduct which is not subject to legislative scrutiny.

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A further concern that we have relates to the proposed rules for admission of overseas lawyers as barristers in Hong Kong. Until the rules are published it is difficult to ascertain whether they will comply with GATS in both letter and spirit and not merely serve as an obstacle to the admission of suitable candidates from overseas. It is in Hong Kong's interests that the Hong Kong Bar should not be artificially restricted by entry regulations which serve only to reduce competition and thus increase legal fees in a market which is already small.

I hope that this may assist the Bills Committee.

Yours sincerely,

Patrick Moss
Secretary General

c.c. Ms. Agnes Cheung, Department of Justice (fax no. 2869 0720)

PM/ff