

香港律師會的信頭

Letterhead of THE LAW SOCIETY OF HONG KONG

Our Ref : SG/FA/1215
Your Ref : CB2/BC/28/98
Direct Line :

30th March 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.

URGENT

Dear Mrs. Ma,

Re: Bills Committee on Legal Practitioners (Amendment) Bill

I set out below some further comments which the Law Society would like to be considered when the Legal Practitioners (Amendment) Bill is discussed and shall be grateful if you would pass these on to the Bills Committee for their meeting on 31 March.

Proposed section 8AAA

The views of the Law Society have been set out in the letter to you dated 29 March from the Department of Justice. The respective roles of an inspector and a prosecutor are correctly set out but it should be made clear that prosecutors are selected from the panel of prosecutors all of whom are in active practice as solicitors.

One amendment to the CSA that we would recommend would be for the substitution of the word "might" for "should" in line 4 of sub clause (2) as we consider it better reflects the reality of the intended practice. I understand that there is no objection to this from the Department of Justice.

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Proposed section 13 (2A)

I do not think that I can usefully add to what was said in my letter to you of 26 February save to say that the Law Society is concerned that on occasions (albeit rare) there have been decisions by Disciplinary Tribunals which are perceived by the complainant and the public as being perverse. This does little to uphold public confidence in the disciplinary process and has been the cause of some injustice. We appreciate that there is no other profession in Hong Kong which has a right of appeal following an acquittal or the imposition of an unjustifiably lenient sentence by its disciplinary tribunal but, with respect, that does not appear to be a good reason for rejecting the proposal which has been followed in other jurisdictions. We believe that there are occasions when a mischief arises which this proposed amendment will resolve.

We would like to point out that section 13 of the Legal Practitioners Ordinance requires that an appeal against a decision of a Disciplinary Tribunal shall be in open court “unless and to the extent to which the Court of Appeal may otherwise direct.” It would therefore be possible for an appeal by the Law Society to be heard in camera or for the name of the solicitor to be nor disclosed until the conclusion of the appeal.

In order to address members’ concerns at the proposal we have suggested that the Law Society should only be permitted to appeal against a Tribunal decision if leave to do so has been granted by the Court of Appeal. This we believe would add a further check exercisable by the Judiciary in a process which would be employed only very sparingly and in the most perverse of decisions which, as I have said, are fortunately exceptional but nevertheless are of concern to us as a regulatory body.

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Proposed section 31C

We have, we believe, already expressed our strongly held views concerning the proposal to establish a category of employed barrister. Our letter of 26 February calls into question the rationale for the proposed new clause. The Bar Association's paper (CB(2) 1099/99-00(01)) seeks to justify the new clause by reference to section 45 (1) of the Legal Practitioners Ordinance. That section reads,

“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.”

It is a prohibition on any one who is not qualified as a solicitor from undertaking any work as a solicitor in connection with the issue and prosecution of any civil or criminal proceedings. It does not restrict what the proposed section intends to permit, namely the seeking of advice by an employed barrister holding an employed barrister's practising certificate from a barrister in private practice.

In our view it is open to anyone with or without professional qualification to seek advice from a barrister in private practice. It is only the Bar Code of Conduct which restricts the giving of advice to solicitors or certain designated professional bodies.

We do not oppose the proposed section 31C if it is restricted to the seeking only of a legal opinion but we do question the need for such a section and if it is implemented we are concerned as to how it will be monitored and enforced. In its paper referred to above the Bar has outlined the difficulties in enforcement of the arrangements it has with

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other professional bodies and has said that it relies upon those other bodies to monitor and enforce the arrangements between the barristers and their directly advised clients. With employed barristers there is no such other body upon whom the Bar Association can rely for such monitoring and enforcement. In our respectful submission the prohibition contained in section 31C is insufficient to ensure compliance.

The limitation placed upon employed barristers is not reflected by way of any sanction against the private barrister who accepts instructions in excess of those permitted. We know of no such prohibition in the Bar Code of Conduct and are concerned that in the absence of any statutory regime and infrastructure for monitoring and enforcing its Code of Conduct it will be a difficult task for the Bar Association to ensure that there is no breach of section 31C. It has been suggested that such a sanction could be contained in the Bar Code. Unlike the subsidiary legislation governing solicitors, their conduct and enforcement of rules, the Bar Code is not subject to scrutiny and “negative vetting” by the Legislative Council. We would regard it as discriminatory if the sanctions against employed barristers were not to be mirrored by sanctions against private barristers in a form which would enable the Legislative Council to maintain adequate checks and balances on such rules.

As an example of what motivates our concern this week the Law Society received a complaint alleging that an unregistered overseas lawyer or Hong Kong barrister employed in a quasi governmental organisation without a practising certificate has briefed a member of the private bar to appear in court on behalf of that organisation. If the complaint is correct there has been not only a breach of the existing provisions in the Legal Practitioners Ordinance but also a breach of the proposed section 31C. The complaint has been passed to the Bar Association.

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We trust that our comments will be considered by the Bills Committee.

Yours sincerely,

Patrick Moss
Secretary General

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

PM/ff