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15 February 2000

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

Fax No. 2509 9055

via Mr Michael Scott, SASG/GAU

Dear Mrs Ma,

Re : Legal Practitioners (Amendment) Bill 1999

Thank you for your letter to us dated 25 January 2000. Our reply to the list of issues raised by the Bills Committee on 24 January 2000 is as follows:-

- (a) To explain and compare the existing procedures and requirements governing the admission of barristers in Hong Kong with the new mechanism as proposed in the Bill.**

Under current legislation (sections 27 and 27A of the Legal Practitioners Ordinance (Cap. 159)), a person may be admitted as a barrister if he or she satisfies one or more of the 5 criteria stipulated in the Legal Practitioners Ordinance.

These criteria are as follows :-

- (i) He/she has been called to the Bar in England, Northern Ireland or Scotland and has practised as a barrister or advocate in the United Kingdom for at least three years, or is a Hong Kong permanent

resident, or has been ordinarily resident in Hong Kong for at least seven years;

- (ii) He/she has obtained a degree in law in the University of Hong Kong or the City University of Hong Kong and has obtained a Postgraduate Certificate in Law ('PCLL');
- (iii) He/she has obtained a PCLL and is a permanent Hong Kong resident, or is a Commonwealth citizen or citizen of the Republic of Ireland who has been ordinarily resident in Hong Kong for at least seven years;
- (iv) He/she has been admitted as a solicitor in Hong Kong for at least three years before his or her application for admission and during that time he/she was in practice as a solicitor in Hong Kong or employed by the Hong Kong government as a legal officer; or
- (v) He/she has been admitted as a barrister or a legal practitioner in Australia, Canada (except Quebec), New Zealand, Republic of Ireland, Zimbabwe or Singapore; and has experience in advocacy; and has been employed in the Department of Justice as a legal officer for at least seven years and was so employed for at least three years on work similar to that usually undertaken by a barrister of ten years seniority; and intends, if admitted, to practise as a barrister in Hong Kong within twelve months after his or her admission.

There is therefore no means for foreign lawyers from non-Commonwealth jurisdictions to gain admission as barristers in Hong Kong. This is inconsistent with the general obligations of the General Agreement on Trade in Services ("GATS") which require such criteria to be objective, reasonable, non-discriminatory and standards-based.

Under the new mechanism proposed in the Legal Practitioners (Amendment) Bill 1999, the Ordinance should be amended by removing the present privileges conferred on barristers or advocates from England, Scotland, Northern Ireland and other Commonwealth countries. Under the new section 27 (clause 7 of the Bill), the Court may admit a person to be a barrister if he/she is considered to be a fit and proper person and has complied with the general admission requirements, including passing any required examinations and paying any required fee as prescribed by the Bar Council. Further, it is proposed that a residency requirement, as stated in the new section 27(2)(b), be

imposed to match the same requirement in respect of solicitors. It is also proposed in the new section 27(4) that the Court should retain a flexible approach to admit a person as a barrister for the purpose of any particular case (so-called “ad hoc admissions”). There is no need for barristers admitted on an ad hoc basis to satisfy the requirements for general admission, such as examinations and residency.

(b) To clarify whether the residency requirement of three months before the date of application for admission will also apply to a Hong Kong permanent resident.

It is provided in the new s. 27(2)(b) that the person applying to be admitted as a barrister must satisfy one of the following residency requirements:-

- (i) has resided in Hong Kong for at least 3 consecutive months immediately before the date of his application for admission;
- (ii) has been ordinarily resident in Hong Kong for at least 7 years;
- (iii) has been physically present in Hong Kong for at least 180 days of each of at least 7 years within the 10 years immediately preceding the date of his application for admission.

In other words, an applicant who is a permanent resident of Hong Kong may or may not need to satisfy the requirement of residing in Hong Kong for at least 3 consecutive months immediately before the date of application for admission.

(c) To respond to the view of the Bills Committee that transitional provisions should be provided in the Bill to safeguard the rights of those who are studying law in Commonwealth countries with a view to seeking admission as barristers in Hong Kong under the existing route.

We explained in the first Bills Committee meeting that by way of delayed commencement of the relevant section relating to the new admission criteria (on a date not earlier than 1 November 2001), sufficient time will be allowed for those who have already embarked or enrolled on the Bar vocational course for the year 2000/2001 to complete the course and to sit the qualifying examinations, and if necessary, to re-sit those examinations. Law students in the UK may make plans to return to Hong Kong to attend the PCLL course. The delayed commencement date will also allow sufficient time for the Bar Council to prepare the necessary rules in relation to the amendments; for

example, rules in relation to the examinations to be sat by persons from foreign jurisdictions for the purpose of admission as barristers in Hong Kong.

In the first Bills Committee meeting, members drew reference to the Medical Registration (Transitional Provisions) Bill 1997 which was a private member's bill that sought to provide an appropriate transitional provision in the Medical Registration (Amendment) Ordinance 1995.

We take the view that the case of UK law graduates can be distinguished from the case of UK medical graduates in that UK law graduates would still need to attend a Bar vocational course and pass the examination before they are qualified to be called to the Bar in Hong Kong pursuant to the existing section 27. Therefore in the case where the admission criteria are changed as now proposed in the Bill, UK law students in their first or second year will still have the option of attending the PCLL course in Hong Kong after they graduate from their universities. This contrasts with the case of UK medical graduates who do not have the choice of attending a course similar to the PCLL in Hong Kong. Once the law was changed in relation to the registration of overseas medical graduates, those batches of UK medical students and graduates were automatically required, without any choice, to sit for and pass a licensing examination before they could register and practise in Hong Kong.

A distinction between the case of medical practitioners and the case of legal practitioners is that the former has a common convention in their practice so that their knowledge can be applied universally. They are not required to adapt to local conditions in order to practise. The case is different in the case of legal practitioners. It is more desirable for foreign law graduates to familiarise themselves with Hong Kong's local conditions and environment before they are admitted as barristers. It should therefore be made known that such overseas law graduates should attend the PCLL course in order to familiarise themselves with local conditions before they seek to become qualified in Hong Kong.

(d) Have regard to the Administration's advice that the Bill is introduced to implement the criteria of the General Agreement on Trade in Services (GATS), to provide the relevant sections of GATS for the reference of the Bills Committee.

There are two types of obligations imposed by GATS –

- (i) general obligations which apply to all service sectors and all members; and
- (ii) specific obligations which take effect only for those sectors in which a member has made an explicit commitment.

Hong Kong has not made any specific commitments in respect of legal services.

There are three general obligations which are relevant to the provision of legal services.

- (i) Most-favoured-nation (MFN) treatment (Article II of the GATS, see Annex A)

The first is MFN treatment. MFN is the founding philosophy behind the GATS. Under this general obligation, any measure taken by a member to services supplied by and service suppliers of another country must immediately and unconditionally be accorded to like services and service suppliers of all members on no less favourable terms. MFN treatment must apply except where a member has specifically sought and obtained an exemption. Where exemptions are not sought, MFN-inconsistent measures run the risk of being challenged unless they can be justified under specific provisions of the GATS or for public order or public security reasons.

- (ii) Recognition requirements (Article VII of the GATS, see Annex B)

The second general obligation relates to the recognition of qualifications and this obligation is most applicable to assess the admission criteria of barristers. GATS permits the automatic and mutual recognition of education and experience obtained, requirements met, or licences or certifications granted, in a particular country, provided that adequate opportunities are afforded to qualification holders from third countries to prove competency and be recognized if they meet the required standards. This general obligation also requires members to set objective, reasonable, non-discriminatory and competency-based criteria for assessing professional qualifications. It is this particular general obligation which has major implications for the legal profession in Hong Kong.

- (iii) Transparency (Article III of the GATS, see Annex C)

The third general obligation requires members to publish, or

otherwise make publicly available, information on measures affecting trade in services. In Hong Kong, this requirement is satisfied by the publication of such information in the government Gazette or the laws of the Hong Kong SAR. There are exemptions, so that, for example, confidential information affecting public or commercial interests needs not be disclosed.

(e) To consider a member's view that the Bill should specify that the proposed amendments will carry no retrospective effect.

We consider that it is unnecessary for the Bill to specify that the proposed amendments have no retrospective effect. It is provided under s. 23 of the Interpretation and General Clauses Ordinance (Cap. 1) that:-

Where an Ordinance repeals in whole or in part any other Ordinance, the repeal shall not-

- (a)
- (b) affect the previous operation of any Ordinance so repealed or anything duly done or suffered under any Ordinance so repealed;
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any Ordinance so repealed;
- (d)
- (e) effect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Ordinance had not been passed.

We therefore consider that the proposed repeal of the existing section 27 will not have any retrospective effect so as to affect any right acquired by any person admitted under the existing section 27.

(f) To provide a list of the proposed amendments to the Bill and to explain the effect of the amendments.

A list of the proposed amendments to the Bill and the effect of the amendments have already been provided in my letter to you dated 25 January 2000.

I would also confirm that the Administration's attendance list is the same as that of the last meeting.

Yours sincerely,

(Ms Kitty Fung)
Government Counsel
Legal Policy Division

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Article II

Most-Favoured-Nation Treatment

1. With respect to any measure covered by this Agreement each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.
2. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of the Annex on Article II Exemptions.
3. The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.

Article VII

Recognition

1. For the purposes of the fulfilment in whole or in part of its standards or criteria for the authorization licensing or certification of services suppliers, and subject to the requirements of paragraph 3. a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.
2. A Member that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Member's territory should be recognized.
3. A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization. licensing or certification of services suppliers, or a disguised restriction on trade in services.
4. Each Member shall:
 - (a) within 12 months from the date on which the WTO Agreement takes effect for it in form the Council for Trade in Services of its existing recognition measures and state whether such measures are based on agreements or arrangements of the type referred to in paragraph 1;
 - (b) promptly inform the Council for Trade in Services as far in advance as possible of the opening of negotiations on an agreement or arrangement of the type referred to in paragraph 1 in order to provide adequate opportunity to any other Member to indicate their interest in participating in the negotiations before they enter a substantive phase;
 - (c) promptly inform the Council for Trade in Services when it adopts new recognition measures or significantly modifies existing ones and state whether the measures are based on an agreement or arrangement of the type referred to in paragraph 1.
5. Wherever appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases. Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.

Article III

Transparency

1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.
2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.
3. Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.
4. Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the “WTO Agreement”). Appropriate flexibility with respect to the time-limit within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations.
5. Any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement.