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

29 March 2000
Second Letter
By fax 2509 9055

via Mr. Michael Scott, SASG/GAU

Dear Mrs. Ma,

Legal Practitioners (Amendment) Bill 1999

I refer to paragraphs (a) and (b) of your letter to us dated 29 February 2000 and would set out hereinafter the Administration's response and comments, prepared with the assistance of the Law Society of Hong Kong.

(a) Clause 3 / Proposed section 8AAA

As indicated in our letter dated 10 March 2000, the Law Society has accepted the views of the members of the Bills Committee. Enclosed herewith marked "A" is a draft CSA which provides that an inspector appointed by the Law Society would be empowered to question: -

- (a) persons who are members or employees of law firms at the relevant time in accordance with procedural rules prescribed by the Council and

- (b) third parties upon authorization of the Council of the Law Society.

There is no longer any provision for the appointment of “prosecutor”. All reference to the proposed section 8AAA hereinafter is to the one as in the enclosed CSA.

(b) Clause 5 / proposed section 13(2A)

UK

Section 48 of the 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. As far as can be ascertained from the record of parliamentary speeches at the time of the introduction of both the 1957 and 1974 Acts, there were no special references to the right of appeal.

One feature common to both the disciplinary committee and the Tribunal is the jurisdiction to consider an application to strike the name of a solicitor off the roll, or to require a solicitor to answer allegations contained in an affidavit, or by a former solicitor to have his name restored to the roll. There is no restriction on who can lodge an application for the first two items. The Law Society may well be the applicant.

In both the 1957 Act and the 1974 Act, barring certain exceptions which are not relevant for the present purposes, an appeal lies at the instance of “the applicant or complainant or the person with respect to whom the application or complaint was made.”.

Hong Kong

Under the local regime, the Disciplinary Committee (as provided for in the original 1964 Ordinance) and the Solicitors Disciplinary Tribunal (as provided for in section 9B of the current Ordinance) were tasked with investigating complaints made to the Law Society. The Law Society would, if it sees fit, refer the complaint to the Committee / Tribunal. The Society does not apply for any specific sanctions as such. Both the Committee and the Tribunal have been empowered to, inter alia, strike off a solicitor.

Section 13 of both the 1964 Ordinance and the current Ordinance, which are very similar, provides for appeal. Subsection (2) thereof provided that the Law Society should be the respondent in any appeal under subsection (1) of the section. By implication the Law Society cannot be the appellant.

Practice in other jurisdictions

(a) Northern Territory of Australia

Sections 50 and 51B of the Legal Practitioners Act (copy enclosed marked “B”) provide for charges before the Complaints Committee and for appeal to the Supreme Court from the decision of the Complaints Committee. There is no apparent restriction against the relevant Law Society being an applicant in an appeal application.

(b) New South Wales, Australia

As per section 171F of the Legal Profession Act 1987 (copy enclosed marked “C”), a party to the proceedings in a Tribunal can appeal against an order or decision made by the Tribunal to the Administrative Appeals Tribunal.

(c) New Zealand

Section 118 of the Law Practitioners Act 1982 (copy enclosed marked “D”) provides that the District Council (i.e. the Council of a District Law Society) may appeal to the court from an order or decision of the District Disciplinary Tribunal.

Conclusion

Despite our best endeavours, we have been unable to locate documentary records of the rationale behind the UK and Hong Kong provisions being couched as they have been.

The Law Society has conceded that the proposed right of appeal should be restricted by a requirement to first seek the leave of the Court of Appeal. The enclosed CSA for the proposed clause 5(b) has been prepared with this in mind. It appears that it is already open to either party to an appeal to apply for the hearing to be held in camera as this is provided for in section 13(4) of the Ordinance.

Yours sincerely,

(Agnes Cheung)
Senior Government Counsel
Legal Policy Division

WMADD: DMA#13476v5

1st draft: 12.10.99

2nd draft: 22.12.99

3rd draft: 11.2.2000

4th draft: 16.2.2000

5th draft: 21.3.2000

LEGAL PRACTITIONERS (AMENDMENT) BILL 1999

COMMITTEE STAGE.

Amendments to be moved by the Secretary for Justice

Clause

Amendment Proposed

- 1 (a) In subsection (2) by deleting “section 15” and substituting “sections 7, 8, 9, 10(b), 11(a), 15 and 16”.
- (b) By adding -
- “(3) Sections 7, 8, 9, 10(b), 11(a) and 16 shall come into operation on a day to be appointed by the Secretary for Justice by notice in the Gazette, which shall not be before 1 November 2001.”.
- 3 By deleting the proposed section 8AAA and substituting -
- “8AAA. Additional powers
of an inspector**
- (1) In this section “inspector” ()

means an inspector appointed under section 8AA.

(2) 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.

(3) For the purposes of this section, an inspector may, in accordance with procedural rules prescribed by the Council, question -

- (a) persons who are, or were at the material time, members or employees of any law firm; or
- (b) where authorized by the Council, any other persons whom the inspector considers may be able to assist the Council.

5(b) In the proposed subsection (2A), by adding “, with leave of the Court of Appeal,” after “may”.

6 In the proposed section 13A -

- (a) in subsection (1) by deleting “The” and substituting “Unless, on application by the solicitor, the Solicitors Disciplinary Tribunal or a court, on an appeal under section 13, otherwise orders,

the”;

(b) by deleting subsection (2).

7

By deleting the proposed section 27(4) and substituting -

“(4) Notwithstanding that a person does not satisfy all the requirements specified in subsections (1) and (2)(b), where the Court considers that he is a fit and proper person to be a barrister and is satisfied that he has -

(a) the qualification acquired outside Hong Kong to engage in work that would, if undertaken in Hong Kong, be similar to that undertaken by a barrister in the course of ordinary practice as a barrister in the High Court or Court of Final Appeal; and

(b) substantial experience in advocacy in a court,

the Court may admit such person as a barrister under this section for the purpose of any particular case or cases and may impose such restrictions and conditions on him as it may see fit.”.

10 By deleting paragraph (b) and substituting -

“(b) by repealing subsection (3) and substituting -

“(3) A practising certificate may only be issued to an applicant who has paid to the Hong Kong Bar Association -

(a) except where the Bar Council has exempted the applicant therefrom, the membership subscription; and

(b) except where the applicant has been admitted as a barrister under section 27(4) and the Bar Council has exempted him therefrom, the premium prescribed for insurance of the applicant under the current master policy for professional

indemnity insurance effected by
the Hong Kong Bar Association,
in respect of the period for which the practising
certificate is to be issued.

(3A) On application by a barrister
admitted under section 27(4), the Bar Council may
waive part of the membership subscription.”;”.

12 In the proposed section 31C by adding -

“(3A) 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.”.

15 By adding -

“72AAA.Conflict between rules made

by Chief Justice and Bar

Council

Where power is given to -

- (a) the Chief Justice; and
- (b) the Bar Council,

to make rules in respect of the same matter, rules made by either or both of them in respect of such a matter shall be valid unless there is a direct conflict between such rules, in which case the rules made by the Chief Justice shall be given precedence to the extent of such conflict.”.

16

- (a) By deleting “(i) and (ii)” and substituting “(i), (ii) and (v)”.
- (b) By deleting “as long as he qualifies to practise as a barrister under section 31 of the principal Ordinance” and substituting “because of such repeal”.

LEGAL PRACTITIONERS ACT (REPL009)

NORTHERN TERRITORY OF AUSTRALIA

LEGAL PRACTITIONERS ACT

As in force at 1 July 1996

Division 6 - Proceedings before Complaints Committee

50. CHARGES BEFORE COMPLAINTS COMMITTEE

(1) The Attorney-General or, subject to subsection (1A), the Law Society or a person who lodged a complaint under section 46 and who is not satisfied with the Law Society's disposal of the matter may lay a charge of professional misconduct against a legal practitioner or a person who, at the time of the alleged professional misconduct, was a legal practitioner.

(1A) A charge of professional misconduct in which the misconduct alleged consists solely of a contravention of, or failure to comply with, a provision of the professional conduct rules may be laid only by the Attorney-General or by the Law Society with the consent of the Attorney-General.

(2) A charge under subsection (1) shall be -

- (a) laid before the Complaints Committee; and
- (b) in the prescribed form.

(3) Where a charge has been laid under subsection (2), the Complaints Committee shall -

- (a) summarily dismiss a charge which, in its opinion, is frivolous or vexatious; or
- (b) inquire into the professional conduct of the legal practitioner or former legal practitioner to whom the charge relates.

(4) Where the Complaints Committee has inquired into the professional conduct of a legal practitioner or former legal practitioner under subsection (3), and it is satisfied -

(a) that the legal practitioner is guilty of professional misconduct it may -

(i) where it is of the opinion that it is justified in doing so having regard to the circumstances of the case and the record of the legal practitioner, record a finding that that legal practitioner has been guilty of professional misconduct but take no further action in the matter;

(ia) admonish or reprimand that legal practitioner;

(ii) order that legal practitioner to pay a fine not exceeding \$5,000;

(iii) by order, suspend the right of that legal practitioner to practise the profession of the law for a period not exceeding one year;

(iv) order that that legal practitioner shall not, during a period stipulated in the order (but not exceeding 6 months), practise the profession of the law otherwise than in accordance with conditions stipulated in the order; or

(v) recommend that disciplinary proceedings be commenced against that legal practitioner in the Supreme Court; or

(b) that that former legal practitioner was, while he remained a legal practitioner, guilty of professional

misconduct, it may order that former legal practitioner to pay a fine not exceeding \$5,000.

(4A) Where the conduct to which a charge under subsection (1) relates has been the subject of a complaint against the legal practitioner under section 46 -

(a) the powers of the Complaints Committee include power to confirm or quash a finding, admonishment or fine recorded or imposed by the Law Society under section 47(1)(ba) or (c); and

(b) the exercise by the Complaints Committee of a power under subsection (4) has effect in substitution for anything done by the Law Society in its disposal of the complaint.

(5) The Complaints Committee shall transmit the evidence taken by it upon the inquiry, together with a memorandum of its findings, to the Attorney-General and the Law Society as soon as is practicable.

51B.APPEAL TO SUPREME COURT

(1) Subject to subsection (2), a right of appeal to the Supreme Court shall lie against a finding, admonishment or fine confirmed by the Complaints Committee under section 49A(2)(a) or 50(4A)(a), or a finding recorded, admonishment or reprimand administered or order made by the Complaints Committee in the exercise or purported exercise of its powers or the performance or purported performance of its functions under this Act.

(2) An appeal under subsection (1) shall be instituted within one month from the date on which the Complaints Committee confirmed the finding, admonishment or fine appealed against or, as the case may be, recorded, administered or made the finding, admonishment, reprimand or order appealed against, but the Supreme Court may, where it is satisfied that it is just and reasonable in the circumstances to do so, dispense with the requirement that the appeal should be so instituted.

(2A) Where an appeal under subsection (1) puts in issue conduct of a legal practitioner which has been the subject of a complaint under section 46 or a charge under section 50(1), the Supreme Court shall hear the appeal by way of rehearing the complaint or charge.

(3) The Supreme Court may, on the hearing of an appeal under subsection (1) -

(a) confirm, vary or quash the finding, penalty or order appealed against, or substitute or make any finding, penalty or order that could have been made by the Complaints Committee;

(b) remit the subject matter of the appeal to the Complaints Committee for further hearing or consideration or for re-hearing; or

(c) make any further or other order as to costs or other matter that the case requires.


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LEGAL PROFESSION ACT 1987 - SECT 3
3 Definitions

(1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

accountant means an accountant who is a registered company auditor (within the meaning of the Companies (New South Wales) Code).

Admission Board means the Legal Practitioners Admission Board constituted under Part 2.

admission rules means rules made under this Act by the Admission Board.

Advisory Council means the Legal Profession Advisory Council constituted under Part 5.

Appeal Panel of the Tribunal means an Appeal Panel constituted under the Administrative Decisions Tribunal Act 1997.

bank means:

(a) a bank constituted by a law of the State or of the Commonwealth or another State, or

(b) a bank within the meaning of the Banking Act 1959 of the Commonwealth.

Bar Association means the New South Wales Bar Association.

Bar Council means the Council of the Bar Association.

barrister means:

(a) a legal practitioner who holds a current practising certificate as a barrister, or

(b) an interstate legal practitioner who practises as a barrister in this State.

barristers rules means rules made under this Act by the Bar Council.

Commissioner means the Legal Services Commissioner appointed under Part 10.

corresponding law see section 48N.

costs includes fees, charges, disbursements, expenses and remuneration.

Council means the Bar Council or the Law Society Council.

Director-General means the Director-General of the Attorney General's Department.

domestic lawyer see section 48ZE.

Fidelity Fund means the Solicitors' Fidelity Fund established and maintained under Part 7.

foreign law see section 48ZE.

foreign lawyer see section 48ZE.

foreign lawyers rules means rules made under section 57A (3), 57B (3) or 57CA.

foreign registration authority see section 48ZE.

home registration authority see section 48ZE.

home State see section 48N.

insurer means a person (whether or not a corporation) who or which carries on insurance business in New South Wales or elsewhere.

interstate legal practitioner see section 48N.

interstate practising certificate see section 48N.

investigator means an investigator appointed under section 55.

joint rules means rules made under this Act jointly by the Bar Council and the Law Society Council.

Law Society means the Law Society of New South Wales.

Law Society Council means the Council of the Law Society.

lay member of a body means a member who is not a legal practitioner.

legal practitioner means a person enrolled in the Supreme Court as a legal



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LEGAL PROFESSION ACT 1987 - SECT 171F

171F Appeals to Appeal Panel against decisions and orders of Tribunal

An order or other decision made by the Tribunal under this Act may be appealed to an Appeal Panel of the Tribunal under Part 1 of Chapter 7 of the Administrative Decisions Tribunal Act 1997 by a party to the proceedings in which the order or decision is made.

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Law Practitioners Act 1982 123

Commenced: 1 Apr 1983

VII: Discipline Within the Legal Profession

New Zealand Law Practitioners Disciplinary Tribunal

118 Appeal from decision of New Zealand Disciplinary Tribunal

118. Appeal from decision of New Zealand Disciplinary Tribunal---(1)
An appeal against any order or decision of the New Zealand Law Practitioners Disciplinary Tribunal made under this Part of this Act or under section 58 of this Act shall lie to the Court at the instance of---

- (a) The practitioner or person to whom the order or decision relates:
- (b) The District Council or a complaints committee of a district, where the proceedings before the Tribunal were---
 - (i) Brought by that Council or committee; or
 - (ii) Commenced by the referral of a charge to the Tribunal by the District Disciplinary Tribunal; or
 - (iii) By way of appeal against an order or decision of the District Disciplinary Tribunal:
- (c) The District Council, where the proceedings before the Tribunal were commenced by the referral to the Tribunal of a matter relating to the issue of a practising certificate under section 58 of this Act.

(2) Every such appeal shall be by way of rehearing, and shall be made within such time and in such form, and shall be heard by at least 3 Judges in such manner, as may be prescribed by rules of Court.

(3) On hearing any such appeal, the Court may confirm, reverse, or modify the order or decision appealed against.
Cf. 1955, No. 101, s. 50; 1961, No. 47, s. 30 (2)

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