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Legislative Council Building
8 Jackson Road
Central
Hong Kong
Attn: Miss Bernice Wong, Assistant Legal Adviser
via Mr. Michael Scott, SASG/GAU

Fax No. 2877 5029

Dear Bernice,

Re : Legal Practitioners (Amendment) Bill 1999

We refer to your letter to us dated 19 August 1999 and apologize for the delay in replying. Our reply to the questions raised is as follows :-

Clause 3 – new section 8AAA

It is intended that the prosecutor employed by the Law Society will be a lawyer who has obtained has legal qualifications to practice in any jurisdiction. The jurisdiction referred to may or may not be in Hong Kong. It can be a foreign jurisdiction. From a drafting point of view, the word “a” is as good as “any” appearing in the new section 8AAA.

Clause 5 – section 13

From a drafting point of view, it is considered that the cross-reference to “第(1)款” is appropriate and more importantly it is consistent with subsection (2) of that section.

Clause 6 - new section 13A

We are still awaiting comments from the Law Society on this item and will let you have our reply as soon as possible.

Clause 7 – section 27

The Chinese text of the provision does specify the elements of “consecutive” and “immediately before” by saying “在 ... 前 3 個月內一直 ...” though it is not a word-by-word translation of the English text. As to the element of “at least”, it is always possible for us to render the Chinese text as “在 ... 前 3 個月或更長時間內一直 ...” which, in our view, is quite odd and clumsy.

In short, the legal effect of the English and Chinese text is the same given that the period of 3 months is always the minimum requirement to be complied with and we do not consider that any person reading the Chinese text would interpret the same as a maximum requirement.

Clause 9 – section 29

With respect to clause 9, section 29(2B) deals with an overseas barrister admitted for a particular case or cases under section 27(4). It is intended that common sense will dictate when the case is over. In any case, the court would become involved if there is a dispute between the Bar Council and the barrister over the appropriate point in time. Such a dispute seems very unlikely. Since the barrister can perform no other work in Hong Kong, section 29(2B) seems just to allow the Bar Council to keep its register from becoming clogged with names that finished cases years ago. It is however unlikely that the Bar Council will be waiting with pen poised to remove the name of such barrister at the first opportunity.

Clause 10 – section 30

We agree with you that, from a drafting point of view, it may be more appropriate to replace “practising barrister’s certificate” with “practising certificate”. We will consider whether CSAs will be taken out to effect this amendment.

Clause 11 – section 31

The conditions for admission, including the content of the existing provision of s. 27(1)(a)(v), will be enacted through subsidiary legislation. It is

intended that such subsidiary legislation will have the same commencement date as the Legal Practitioners (Amendment) Ordinance 1999. Therefore those barristers qualified by virtue of s. 27(1)(a)(v) will not be affected by the repeal of this section. Furthermore we intend to incorporate this subsection in the savings provision in cl. 16.

Clause 12 – new section 31C

- (a) It can be seen from the wording in the new section 31C(2) that an employed barrister **may** apply to the Bar Council for an employed barrister's certificate. Those employed barristers who do not hold an employed barrister's certificate will not be able to instruct a practising barrister for obtaining a legal opinion pursuant to the new s. 31C(4).
- (b) It is our view that s. 31(1)(f) does not need to be amended since an employed barrister cannot be a practising barrister. The existence of s. 31(1)(f) will make the situation clear that employed barrister, though issued with an employed barrister certificate, is not able to practise as a barrister with practising certificate issued under s. 30. A barrister holding a current practising certificate, if he becomes employed, should apply for his practising certificate to be exchanged for employed barrister's certificate.
- (d)
 - (i) It is intended that section 30(2) also applies to employed barristers.
 - (ii) It will not be unfair to the employed barristers since they are always free to apply for employed barrister's certificate.
 - (iii) We will consider whether CSAs will be taken out to clarify that the reference to s.31 under s.30(2) is deemed a reference to s.31C in the case of employed barristers.

Clause 15 – Section 72AA

We realize that certain powers of the Bar Council to make rules overlap with the powers of the Chief Justice under ss 72 and 72A.

We intend to preserve the existing powers of the Chief Justice to make subsidiary legislation. At the same time, we consider that there will be no practical problem with the overlapping powers since the rules made by the Bar Council will in any event be subject to the approval of the Chief Justice.

Therefore, it is unlikely that the rules will conflict with each other. However, for the avoidance of doubt, we intend to move CSAs to make it clear that the Bar Council has the power to make rules under s.72AA notwithstanding the power of the Chief Justice to make the relevant rules under s.72A and vice versa.

Clause 16 – Savings Provision

We will consider whether CSAs will be moved to cover the case of barristers admitted under s. 27(1)(a)(v).

Consequential Amendment – Section 27A and Schedule 1

As section 27A of Cap. 159 has ramifications with s. 2A of the Legal Officers Ordinance (Cap. 87), we are now studying the issue in detail. Therefore we are not in a position at this stage to make any proposal to amend or repeal s. 27A of Cap. 159.

Meanwhile, we will let you have our proposed draft CSAs for your consideration once they are ready.

(Ms Kitty Fung)
Government Counsel
General Advisory Unit/Legal Policy Division