

立法會 *Legislative Council*

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Report of the Bills Committee on Legal Practitioners (Amendment) Bill 1999

Purpose

This paper reports on the deliberations of the Bills Committee on the Legal Practitioners (Amendment) Bill 1999.

The Bill

2. The purpose of the Bill is to make miscellaneous amendments to the Legal Practitioners Ordinance (Cap. 159).

The Bills Committee

3. On 2 July 1999, the House Committee agreed to form a Bills Committee to scrutinize the Bill in detail. At the first meeting of the Bills Committee on 24 January 2000, Hon Margarat NG was elected Chairman of the Bills Committee. The membership list of the Bills Committee is in **Appendix I**.

4. The Bills Committee has held seven meetings with the Administration. It has met with representatives of the Hong Kong Bar Association and the Law Society of Hong Kong. It has also considered the views of the Faculty of Law of The University of Hong Kong, the School of Law of The City University and a number of written submissions from legal practitioners.

Deliberations of the Bills Committee

Major issues

5. The Bills Committee has deliberated at length the following major issues. Its deliberations are summarized below.

Appointment and powers of a prosecutor
(proposed section 8AAA under clause 3)

6. Members have sought clarifications on the powers and duties of an "inspector" appointed by the Law Society under the existing section 8AA vis-a-vis a "prosecutor" now proposed under section 8AAA, and the need to empower the prosecutor to have the power to "summon any other persons" to appear before him to answer questions.

7. The Law Society has explained that the Solicitors Disciplinary Tribunal (SDT) is empowered to order the attendance of witnesses and examine them upon oath or otherwise. However, this power is only exercisable when a prima facie case is established against a person and a date is fixed for hearing of the disciplinary proceedings. Under the existing section 8AA, a person may be appointed as an inspector to assist the Society in verifying compliance by a solicitor, a foreign lawyer, a trainee solicitor or an employee of a solicitor or foreign lawyer within the provisions of the Ordinance or any practice direction issued by the Society, and in determining whether the conduct of the aforementioned persons should be inquired into or investigated. Under proposed section 8AAA, a prosecutor may be appointed to summon persons who are or were members or employees of law firms or any other persons who may be able to assist in a suspected disciplinary offence to give evidence to the Law Society at the pre-disciplinary stage. No sanction is proposed for failure to comply with summons. Under the proposal, the prosecutor employed by the Law Society will be a lawyer who has legal qualifications to practise in any jurisdiction. It is believed that it would be of considerable assistance in the investigation process if the prosecutor is given a power to summon.

8. Having noted the Law Society's explanations, some members consider that there might be a blurring of the distinction between the investigatory process and the quasi-judicial process as both inspectors and prosecutors would be involved in the gathering of evidence in respect of a matter which the Council of the Law Society is considering for the purpose of deciding whether it should be referred to the Convenor of the SDT. They have suggested that the powers of inspectors could be enlarged to cover those proposed for prosecutors. Other members have queried the need for prosecutors to be given the power to "summon" persons given that there is no sanction for failure in compliance, and the scope of the power i.e. to summon "any other persons".

9. Having regard to members' view and after consultation with the Law Society, the Administration has agreed to introduce a Committee Stage amendment (CSA) to provide that an inspector appointed by the Law Society would be empowered to question persons who are members or employees of law firms at the material time, and to question third parties upon authorization of the Council of the Law Society. There is no longer necessary to provide for the appointment of "prosecutor".

Appeal against decisions of Solicitors Disciplinary Tribunal (SDT)
(proposed section 13 (2A) under clause 5)

10. According to the Administration, the Law Society currently has no right to appeal against a finding of the SDT as to guilt and sentence, although the other party to an SDT proceedings is entitled to appeal to the Court of Appeal under the Ordinance. It is proposed to amend the Ordinance to give the Law Society a right to appeal against a finding of the SDT. The Law Society would then be in a better position to protect the public and maintain public confidence in disciplinary proceedings where these may be undermined by erroneous decisions of the SDT.

11. In response to members' enquiry, the Law Society has advised that the SDT is appointed by the Chief Justice and is independent of the Law Society. Several decisions made by the SDT within the past 12 months or so have caused concern to the Council of the Law Society because they appear to have been "perverse". It is the Council's view that these decisions did not do justice to the complainants or uphold the public interest.

12. At the request of members, the legal adviser to the Bills Committee has provided information relating to the right to appeal to a court against the decision of a disciplinary body of 27 other professional bodies in Hong Kong. Members note that only persons who consider themselves aggrieved by a decision made in respect of him have the right to appeal. No provision similar to the new section 13(2A) which empowers the Council of the Law Society to appeal against a decision of the SDT is found in any of the ordinances relating to these professional bodies.

13. While appreciating the position in respect of other professional bodies in Hong Kong, the Law Society does not consider that to be a good reason for rejecting the proposal which has been followed in other jurisdictions. It points out that the Law Society of the England and Wales has unfettered power to appeal against the decision of a disciplinary tribunal. The Bills Committee has requested the Administration to explain the rationale behind the United Kingdom (UK) and Hong Kong provisions being couched as they have been. Despite its best endeavours, the Administration cannot locate documentary records in this respect. However, it has provided information on the practice in other jurisdictions. It is noted that the legal professional bodies in Northern Territory of Australia, New South Wales of Australia and New Zealand may appeal against an order or a decision of their respective disciplinary boards.

14. At the request of the Bills Committee, the Law Society has provided some recent examples of "perverse" decisions of the SDT for members' reference. The Administration has also explained the general powers of the Court of Appeal in dealing with an appeal against an order of the SDT and the circumstances in which the Court may order a new trial.

15. Some members are concerned that under the proposal, a member of the Law Society who is acquitted on a "perverse" decision might have to face the risk of even heavier legal costs on appeal, plus a hearing in an open court. The Administration points out that it is already open to either party to an appeal to apply for the hearing to be held in camera under section 13(4) of the Ordinance.

16. To further address members' concern about the proposal, 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. After consideration, the Bills Committee has agreed to support the revised proposal. The Administration will move a CSA to such effect.

Power of Court to admit barristers
(proposed section 27 under clause 7)

17. Section 27 sets out the criteria for a person to be admitted as a barrister. Under section 27(1), a person who has been called to the Bar in England, Northern Ireland or has been admitted as an advocate in Scotland may be admitted as a barrister subject to meeting the other requirements in the section. However, except for section 27A, there is no means for foreign lawyers from other jurisdictions to gain admission as barristers in Hong Kong under the Ordinance. 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. In 1996, following a consultation exercise seeking the views of the legal profession and the public in the previous year, the Attorney General's Chambers proposed that legislation be introduced to implement the GATS criteria.

18. Clause 7 of the Bill seeks to repeal the existing section 27 and replace it with a new provision. With the repeal of section 27, the present privileges conferred on barristers or advocates from England, Scotland and Northern Ireland will be removed. Under the new admission mechanism, the Court may admit a person to be a barrister if he 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.

19. The impact of the Bill on students enrolled in legal studies in the UK has caused considerable concern to the Bills Committee. Some members are concerned whether the rights of these law students to seek admission to the Bar under the existing route would be protected. Other members have queried whether the proposed new mechanism is meant to discourage people from studying abroad. A member has referred to the controversies arising from the enactment of the Medical Registration (Amendment) Ordinance 1995 which removed the right of medical students graduated from recognized institutions in certain Commonwealth countries to automatic registration, and required them to

pass a licentiate examination set by the Medical Council before they could register and practise in Hong Kong. This had subsequently led to the introduction of the Medical Registration (Transitional Provisions) Bill 1997 which was a Member's Bill seeking to provide a reasonable period in which the overseas medical students affected could return to Hong Kong to register. The member has requested the Administration to take into account the case quoted in considering the question of transitional arrangements for the UK law students.

20. The Administration has advised that by way of delayed commencement of the relevant section relating to new admission criteria on a date not earlier than 1 November 2001, sufficient time will be allowed for students 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. In addition, law students in the UK may make plans to return to Hong Kong to attend the Post Certificate in Laws (PCLL) course which is a one year course for students who hold the Bachelor of Laws (LLB) degree or its equivalent and who want to join the legal profession in Hong Kong. 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.

21. The Administration takes the view that the case of UK law graduates is different from that of UK medical graduates in that the 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. Under the new admission criteria proposed, UK law graduates will still have the option of attending the PCCL course in Hong Kong. As regards the case of UK medical graduates, they were required without any choice to sit for and pass a licensing examination before they could register and practise in Hong Kong, upon the change of law relating to the registration of overseas medical graduates.

22. Another major concern of members is whether the PCLL places offered by the two local universities could cope with the possible increase of UK law graduates seeking entry to the course as a result of the new admission mechanism proposed under the Bill. According to the information provided by the Bar Association, the figure of admission of UK-qualified barristers in Hong Kong has fluctuated from year to year, ranging from 18 in 1999 to 41 in 1997. Enquiries have been made with the Faculty of Law of The University of Hong Kong and the School of Law of The City University in this respect. On the basis of the statistics provided by the Bar Association, the former believes that it should be able to absorb the anticipated increase of UK law graduates provided that the present number of student places and present level of funding provided is not reduced in the next few years. The latter has advised that in addition to target intake, it could consider offering full-fee paying places if necessary.

23. Members remain concerned about the plight of UK law students who would be affected by the new admission criteria. They point out that students currently pursuing legal studies in UK have had a reasonable expectation that they could be admitted to the Hong Kong Bar under the existing route by virtue of the UK qualification and have acted on that expectation. Under the proposed transitional arrangement, only students who have embarked or enrolled on the Bar vocational course in UK for the year 2000/2001 will not be affected by the new admission mechanism. Other students will be required to take examinations for foreign lawyers set by the Bar Council before they can be admitted as barristers in Hong Kong, albeit the fact that they have passed the relevant examinations and qualify as barristers in UK. As the two local universities have advised that no PLCC quota would be set aside for UK law students and admission is based on merit, there is no guarantee that they could attend the PCLL course at a time of their choice. This would be extremely unfair to these students as their future is uncertain.

24. The Administration has reiterated its view, which is similar to the view of the Bar Association, that it is more desirable for foreign law graduates to familiarize themselves with Hong Kong's local conditions and environment before they are admitted as barristers. It is to the benefit of these foreign law graduates to return to Hong Kong and attend the PCLL course. As regards admission to the PCLL course, the Administration argues that a person offered a place in a UK law school may not necessarily be able to secure a place in the institution for the Bar vocational course. The Administration also takes the view that there is no justification for giving favourable treatment to persons embarking in the study of law in the UK and then to discriminate against those who are not studying in UK university, e.g. those who are doing an external LLB in Hong Kong.

25. In order to have a clearer picture of the implications of the new admission mechanism, members have requested the Administration to provide an estimate of the number of Hong Kong students who are currently studying law in other Commonwealth countries or an external LLB in Hong Kong. According to the Administration, as at 29 May 2000, the number of Hong Kong students in the UK attending the relevant courses is 176, and the number of students in Hong Kong doing UK relevant external courses is 2 812.

26. After detailed deliberations, the Bills Committee requests the Administration to consider extending the exemption to all students who are enrolled or registered or have been offered a place in a course of legal studies in the UK as at the time of enactment of the Bill. As a matter of principle, the same arrangement should apply to those pursuing an external course of studies in Hong Kong offered by an institution in the UK.

27. After consideration, the Administration has finally agreed to accede to members' request. It will introduce a new section to cater for the situation of

students already enrolled in legal studies in the UK by way of a CSA (proposed section 74B under new clause 18). Members note that with the deadline for seeking admission as barristers to be deferred to 31 December 2004, students pursuing legal studies commencing in 2000/2001 will be exempt from the new admission criteria.

Additional powers of Court to admit barristers
(section 27A of the Ordinance)

28. Pursuant to the proposed amendment to section 27 of the Ordinance as explained above, the continued existence of section 27A of the Ordinance has caused grave concern to the Bills Committee.

29. In response to the Bills Committee, the Administration has explained the background for enactment of section 27A in 1989. Members note that there were lawyers working in the Government who, despite having substantial experience in the practice of Hong Kong law, were prevented from being admitted as a barrister unless they had obtained a PCLL. The Administration therefore proposed that such lawyers be exempted from pursuing the PCLL and be allowed to be admitted under specified conditions provided in section 27A. Schedule 1 to the Ordinance lists out the specific jurisdictions from which lawyers in Government service had been recruited at the time when the section was enacted, which included Australia, Canada (except Quebec), New Zealand, the Republic of Ireland and Zimbabwe. Singapore was included as it has a system of legal education and training comparable to Hong Kong. As the Administration expected that some people from the Government legal service might decide to join the private sector as a result of enactment of section 27A, it therefore proposed to limit such admissions to a maximum of four barristers in any period of 12 months under section 27A(2). This would ensure that the Government legal service could adjust smoothly to any changes.

30. The Administration agrees that section 27A is inconsistent with the general obligations under GATS and discriminatory in three aspects : only those qualified in jurisdictions specified may benefit from the section, legal officers from other Government departments cannot rely on this channel of admission, and there is a quota of four persons to be admitted each year.

31. The Administration has consulted all counsel in the Department of Justice on the matter. While the Administration agrees that section 27A should be repealed, it considers that some transitional arrangements should be provided to protect the accrued rights of those counsel in the Department who already satisfy the criteria for admission under that section. The Administration will introduce CSAs to allow legal officers in the Department who, before the repeal of section 27A on 1 November 2001, satisfy the requirements under section 27A(1)(a)-(d) to gain admission as barristers. Under the new arrangement (proposed section

74C under new clause 18), counsel within the Department have until 1 November 2001 to fulfil the admission criteria under section 27A as that section existed before its repeal by this Bill. However, those qualified counsel could apply for admission at any time in the future, subject to the quota of four admissions in any period of 12 months. According to the Administration, only 13 counsel would be qualified to do so by 1 November 2001. The proposed arrangement has the support of the Bar Association.

32. Some members have asked the Administration to explain the criteria for selecting the counsel from the Department of Justice in the event that more than four counsel seek admission as barristers in Hong Kong. They have expressed concern about the preservation of fairness and natural justice in the selection process. Members note that the Department of Justice does not select the counsel who would seek admission under section 27A. Applications for admission are made to the High Court. Each application would be assigned a "Miscellaneous Proceedings Number". The Bar Association may oppose an application only if it does not comply with the requirements of section 27A. Since the enactment of section 27A in 1989, the quota of four has never been filled for any period of 12 months. The calculation of any period of 12 months is with reference to the time of submitting an application. Unless more than four counsel decide to seek admission in the same month, the quota of four for any particular period of 12 months is unlikely to be exhausted. If this should happen, priority would depend on the Miscellaneous Proceedings Numbers.

33. Given the small number of counsel who would be qualified for admission as barristers under the route and the fact that the quota of four has never been filled in the past, some members have suggested that the quota should be abolished. While the Administration has no strong view either way, representatives of the Bar Association present at the meeting have expressed reservation about the suggestion. The Bills Committee agrees that it should be a matter for the Administration and the legal professional body.

Other issues

34. The Bills Committee has also considered and discussed the following proposals under the Bill. The Administration will move a number of CSAs in response to the views of members, the legal professional bodies and the legal adviser to the Bills Committee,

Definition of "Hong Kong firm"

(section 2(1) under clause 2)

35. According to the Administration, the definition of "Hong Kong firm" in the Ordinance is open to interpretation that only partners of a Hong Kong firm who are resident in Hong Kong are required to be solicitors, with the effect that

firms may have non-resident partners who are not solicitors. It is therefore arguable that non-resident partners do not have to be qualified lawyers and are not subject to the regulatory control of the Law Society. The Bill proposes to clarify the definition of "Hong Kong firm" by repealing "resident in Hong Kong".

36. The Bills Committee has raised concern about whether a law firm would cease to be a "Hong Kong firm" if one of the partners is suspended from practice as a solicitor. The Administration has explained that by definition, a solicitor is a person who is on the Roll and is not suspended. A suspended solicitor could not be a partner in a solicitors' firm. The proposed amendment does not affect the present position. The remaining partners, or sole practitioner, would continue to be a "Hong Kong firm".

Solicitors Disciplinary Tribunal (SDT) Panel
(section 9(1) under clause 4)

37. Members note that the Ordinance provides that the Chief Justice shall appoint a SDT Panel consisting of not more than 60 practising solicitors and 30 lay persons. Due to the expansion of the Law Society's membership and the increasing workload of the SDT Panel members, it is considered desirable that the SDT Panel be able to draw from a larger pool of talent so that the maintenance of the discipline of legal practitioners can be as efficient as possible. The Bill proposes to increase the numbers to 120 practising solicitors and 60 lay persons.

Publication of findings of Solicitors Disciplinary Tribunal (SDT)
(proposed section 13A under clause 6)

38. The Bills Committee notes that it is the existing practice of the Law Society to publish resumes or findings and orders of the SDT in its official magazines. It is proposed to amend the Ordinance to enable the Law Society to publish resumes of findings and orders of the SDT and the name of the solicitor convicted of an offence unless the SDT orders otherwise. In the case of an acquittal, there will be no mention of the name of the respondent or anything that can enable him to be identified. A respondent may seek an order from the SDT prohibiting that the acquittal will not be published.

39. The Law Society has subsequently clarified that its intention is that the solicitor (regardless of whether he has been found guilty or otherwise) should have an inherent right to request that his name and/or the finding in his case should not be published. The Administration therefore proposes a CSA to the effect that the Law Society may publish such summary unless, on application by the solicitor, the SDT or the Court of Appeal orders otherwise.

Power of Court to admit barristers
(proposed section 27 under clause 7)

Draft rules made by the Bar Council

40. Under proposed section 27(1), the Court may admit a person as a barrister subject to the person has complied with the requirements, passed the examinations and paid the fees prescribed by the Bar Council.

41. At the invitation of the Bills Committee, representatives of the Bar Association have briefed members on the draft rules relating to matters such as qualification and application for admission under proposed section 27(1) and as an overseas lawyer, the examination, pupillage, application for a practising certificate, and payment of fees. Members note that the rules are subsidiary legislation which are subject to scrutiny of LegCo.

Ad hoc admissions

42. The Bill proposes that the Court should retain the power to admit barristers on an ad hoc basis without the need to satisfy the requirements for general admissions, such as examinations and residency. It will be to the benefit of the public and the proper development of the profession if leading counsel from other jurisdictions can appear in the courts, including the Court of Final Appeal.

43. As a result of the suggestion of the Bar Association, the Administration will move a CSA to make it clear that only barristers who have "substantial experience in advocacy in court" can be admitted on an ad hoc basis. This would avoid the risk that inexperienced or freshly admitted barristers may be admitted.

Practising certificates - barristers
(proposed section 30 under clause 10)

44. The Bill provides that the payment of the professional indemnity insurance premium is a prerequisite for the issue of a barrister's practising certificate. It also removes the requirement for application for practising certificates to be made in November.

45. The Administration has proposed to introduce a CSA to require ad hoc admittees to pay to the Bar Association a membership subscription in respect of the period for which the practising certificate is to be issued. The provision will also allow the Bar Council to waive part of the membership subscription payable by ad hoc admittees if they so apply.

Employed barristers

(proposed section 31C under clause 12)

46. In 1996, the then Attorney General's Chambers, noting the support of the Bar Association and the Law Society, recommended that barristers who provide legal services exclusively to an employer under a contract of employment should be entitled to instruct practising barristers directly. The Bill provides for a new category of "employed barrister" who will be issued with an employed barrister's certificate and be allowed to instruct a practising barrister on behalf of his employer for the purpose of obtaining a legal opinion without retaining a solicitor.

47. According to the Bar Association, the category of "employed barristers" is not new. It is defined in the Code of Conduct of the Bar as "a barrister who is engaged to provide legal advice or services for his employer under a contract of employment". Clause 12 of the Bill simply reflects this definition. The Law Society has expressed concern about the fact that the Bar's rules regulating direct professional access cannot cater for direct instruction by employed barristers, and that there is no recognized professional body for "employed barristers" who are simply a class of members of the Bar Association.

48. The Bills Committee notes that the Administration will introduce a CSA to the effect that section 30(2) should also be applicable to employed barristers, that is, the names and addresses of employed barristers holding employed barrister's certificates will be published in the Gazette and the absence of any person's name in the list will be prima facie evidence that the person does not hold such a certificate.

Power of Bar Council to make rules

(proposed section 72AA under clause 15)

49. Clause 15 empowers the Bar Council to make rules governing the admission of barristers and other areas concerning barristers, subject to the Chief Justice's prior approval. Members' attention has been drawn to the fact that certain powers of the Bar Council to make rules under the proposed section 72AA overlap with the powers of the Chief Justice under sections 72 and 72A.

50. The Administration considers that there will be no practical problem with the overlapping powers since the powers of the Bar Council to make rules are subject to the prior approval of the Chief Justice. For the avoidance of doubt, the Administration will move a CSA to make it clear that should there be any conflict between the rules made by Chief Justice and those made by the Bar Council, the rules made by the Chief Justice will prevail.

Committee Stage amendments (CSAs)

51. Apart from the CSAs mentioned above, the Administration will also move other minor, technical and consequential CSAs. A full set of the CSAs to be moved by the Administration is in **Appendix II**.

Consultation with the House Committee

52. The Bills Committee consulted the House Committee on 9 June 2000 and sought the latter's support that the Second Reading debate on the Bill be resumed on 21 June 2000.

Council Business Division 2
Legislative Council Secretariat
14 June 2000

**Bills Committee on
Legal Practitioners (Amendment) Bill 1999**

Membership List

Hon Margaret NG (Chairman)

Hon Albert HO Chun-yan

Hon Ronald ARCULLI, JP

Dr Hon LEONG Che-hung, JP

Hon Jasper TSANG Yok-sing, JP

Hon Ambrose LAU Hon-chuen, JP

Total : 6 Members

Legislative Council Secretariat

17 February 2000