

立法會
Legislative Council

LC Paper No. LS82/98-99

**Paper for the House Committee Meeting
of the Legislative Council
on 18 December 1998**

**Legal Service Division Further Report on
Legal Practitioners (Fees)(Amendment) Rule 1998**

When we reported on the Legal Practitioners (Fees) (Amendment) Rule 1998 to the House Committee meeting on 4 December 1998, we indicated that we were seeking clarification from the Judiciary Administrator on whether the amending rule was properly made by the Chief Justice under section 72 of the Legal Practitioners Ordinance (Cap. 159). This is because section 30(1) and (4) of the Ordinance seems to have empowered the Bar Council to make such a rule.

2. In her reply, the Judiciary Administrator takes the view that the Chief Justice is empowered under section 72 to make rules to prescribe the fees payable for the issue of practising certificates for barristers and that section 72 is the proper empowering section instead of section 30(4).

3. Comments have also been received from the Hon Secretary of the Bar Association, who takes a similar view.

4. Having carefully considered those views, the plain meaning of section 30(1) and (4) and the legislative intent of the section, we are inclined to think that the power of the Chief Justice to make such rules under section 72 has been displaced since 1991, when the Bar Council was specifically empowered to make such rules.

5. Prior to the Legal Practitioners (Amendment) Ordinance 1991 (70 of 1991) (the amending ordinance), practising certificates for barristers were issued by the Registrar of the Supreme Court and the fees paid went to general revenue, which was why the Chief Justice was then empowered under section 72 of the principal ordinance to make rules regulating their fees.

6. This was subsequently changed by the amending ordinance, which substituted the Bar Council for the Registrar in section 30(1), making the Bar Council responsible for issuing the practising certificates and prescribing their fees. At the same time, a new section 30(4) was added to specifically empower the Bar Council to make rules, subject to the prior approval of the Chief Justice, to regulate, among other things, the fees payable for the practising certificates. Section 72 was not amended.

7. In the LegCo Brief issued by the then Attorney General's Chambers on 8 May 1991, it was stated in paragraph 10 that -

“The Bar Association wishes similarly to issue its own certificates and retain the revenue. Practising certificates will only be issued to members of the Bar Association, which is similar to the restriction imposed by the Law Society. With control over the issuance of practising certificates the Bar will be seen to be independent and self-regulating.”

8. We regard the prescribing of fees as part and parcel of the issuance of practising certificates. The retention by the Chief Justice of his power to make rules to regulate the fees of the practising certificates under section 72, which gives no role at all to the Bar Council, would appear to be contrary to that intention and for this reason, may have been displaced by the new power given to the Bar Council in that respect.

9. Copies of our correspondence with the Judiciary Administrator and the Bar Council, the relevant sections of the principal ordinance and the relevant LegCo Brief (without the Annex) are attached.

10. Members are requested to note our views on the proper authority for prescribing fees for the issuance of practising certificates for barristers by way of subsidiary legislation and to consider the way forward.

Prepared by

CHEUNG Ping-Kam, Arthur
Assistant Legal Adviser
Legislative Council Secretariat
16 December 1998

Encl.

LS/S/19/98-99
2869 9283
2877 5029

By Fax (2530 2648) and By Post

27 November 1998

Ms A Tai, JP
Judiciary Administrator
Room 123, G/F
High Court Building
33 Queensway Road
Hong Kong

Dear Madam,

Legal Practitioners (Fees) (Amendment) Rule 1998

I refer to the subject Rule, which was made by the Chief Justice under section 72 of the Legal Practitioners Ordinance (Cap. 159) and gazetted as L.N. 359 of 1998 on 27 November 1998.

Notwithstanding that the fees for the practising certificate of barristers are now prescribed under the same section, it is noted that section 30(4) of the Legal Practitioners Ordinance (Cap. 159) specifically empowers the Bar Council, subject to the prior approval of the Chief Justice, to make rules regulating such fees.

I would therefore be grateful for your clarification on :-

- (a) whether section 30(4) should be the proper empowering provision; and
- (b) whether section 72 is applicable to those fees, in view of section 30(1) and (4), which expressly provides that those fees are to be prescribed, and regulated by rules made, by the Bar Council and if not, whether that would affect the validity of the fees and any revision thereof.

Your reply as soon as possible would be appreciated to allow time for Members' attention to be drawn to the matter within the time frame of section 34 of the Interpretation and General Clauses Ordinance (Cap. 1), if necessary.

Yours faithfully,

(Arthur CHEUNG)
Assistant Legal Adviser

c.c. Bar Council

LS/S/19/98-99
2869 9283
2877 5029

By Fax (2530 2648) and By Post

8 December 1998

Ms A Tai, JP
Judiciary Administrator
Room 123, G/F
High Court Building
33 Queensway Road
Hong Kong

Dear Madam,

Legal Practitioners (Fees) (Amendment) Rule 1998

I would be grateful if you would let me have a response to my letter of 27 November 1998 by close of play on 10 December 1998 as a decision will have to be made on whether any action need to be taken to extend the scrutiny period in relation to the subject Rule by 11 December 1998.

Yours faithfully,

(Arthur CHEUNG)
Assistant Legal Adviser

c.c. Bar Council

LS/S/19/98-99
2869 9283
2877 5029

By Fax (2123 0028) and By Post

11 December 1998

Miss Susie HO,
Deputy Judiciary Administrator (D)
Court of Final Appeal
No. 1 Battery Path
Central
Hong Kong

Dear Miss Ho,

Legal Practitioners (Fees) (Amendment) Rule 1998

Thank you for your letter of 10 December 1998.

I would be grateful for your further clarification on the following points in your letter -

- (a) what the statement "S72 is the proper empowering section instead of s30(4)" seems to be saying is that section 30(4) is not a proper empowering provision for making rules to determine the fees payable for the practising certificates. If that is what is meant, could you explain why section 30(4), despite the clear wording of that subsection and section 30(1), cannot be properly used as an empowering provision to make such rules. If not, could you clarify what it actually means with regard to the status of section 30(4) as such an empowering provision;

- (b) it is also stated that section 30(4) is “consistent with” section 72 by requiring the prior approval of the Chief Justice. Could you explain how section 30(4), in requiring the prior approval of the Chief Justice of the rules made by the Bar Council to regulate the fees for practising certificates, could be regarded as consistent with section 72, which gives the rule making power instead to the Chief Justice and no role at all to the Bar Council.

It is noted that prior to the Legal Practitioners (Amendment) Ordinance 1991 (70 of 1991) (the amending ordinance), practising certificates for barristers were issued by the Registrar of the Supreme Court and the proceeds went to general revenue, which was why the Chief Justice was then empowered to make rules regulating their fees.

This was changed by the amending ordinance, which substituted Bar Council for the Registrar in section 30(1), making the Bar Council responsible for issuing the practising certificates and prescribing their fees. At the same time, a new section 30(4) was added to specifically empower the Bar Council to make rules to regulate, among other things, the fees payable for the practising certificates. Section 72 was not amended.

In the LegCo Brief issued by the then Attorney General’s Chambers on 8 May 1991, it was stated in paragraph 10 that -

“The Bar Association wishes similarly to issue its own certificates and retain the revenue. Practising certificates will only be issued to members of the Bar Association, which is similar to the restriction imposed by the Law Society. With control over the issuance of practising certificates the Bar will be seen to be independent and self-regulating.”

You may wish therefore to consider whether, given the clear intent of the 1991 amendments and the very clear wording of section 30(1) and (4), the power of the Chief Justice to make rules prescribing the fees of the practising certificates, has been displaced.

I would be grateful if you could let me have your response by close of play on 15 December 1998 so that a report incorporating your views may be made in time to Members.

Yours sincerely,

(Arthur CHEUNG)
Assistant Legal Adviser

c.c. Bar Council

Letterhead of Hong Kong Bar Association

28th November, 1998

Your Ref: LS/S/19/98-99

Mr. Arthur Cheung,
Assistant Legal Adviser,
Legislative Council Secretariat,
Legal Service Division,
Legislative Council Building,
8 Jackson Road,
Central,
Hong Kong.

Dear Mr. Cheung,

Re: Legal Practitioners (Fees) (Amendment) Rules 1998

I refer to your letter dated 27th November, 1998 to the Judiciary Administrator which is copied to the Bar Council seeking clarification whether section 30(4) or section 72 of the Legal Practitioners Ordinance, Cap. 159 should be the proper empowering provision of the subject rule.

I am inclined to think that notwithstanding that the Bar Council may make rules regulating the fees payable for the issue of practising certificates under section 30(4) of Cap. 159, this is subject to the prior approval of the Chief Justice. Under section 72 of Cap. 159, the Chief Justice is empowered to make rules to provide for any other fees which is required to be prescribed under the Ordinance. As the Chief Justice has approved the amendment to the Legal Practitioners (Fees) Rules submitted to him by the Bar Council, I am of the view that he is empowered under section 72 to make the subject rule.

.../2

I would like to bring to your attention that since the amendment of the Legal Practitioners (Fees) Rules in 1991 to provide for the fees for the practising certificates to be paid to the Bar Association, the fee for the practising certificate was revised on two occasions by L.N. 387 of 1993 and L.N. 572 of 1994 and on each occasion this was done by an amendment rule made by the Chief Justice under section 72 of Cap. 159.

Yours sincerely,

Susan Kwan
Hon. Secretary

c.c. Miss Alice Tai, Judiciary Administrator

司法機構政務長辦公室的信頭
Letterhead of JUDICIARY ADMINISTRATOR'S OFFICE
香港司法機構
JUDICIARY HONG KONG

Fax.	國文傳真	2123 0028
Tel.	電話	2123 0008
Your Ref.	來函檔號	
Our Ref.	本署檔號	

10 December 1998

Mr Arthur Cheung
Assistant Legal Adviser
Legislative Council Secretariat
Legal Services Division
Legislative Council Building
8 Jackson Road
Central, Hong Kong

Dear Mr Cheung,

Legal Practitioners (Fees) (Amendment) Rule 1998

Thank you for your letters of 27 November and 8 December 1998.

Section 72 of the Legal Practitioners Ordinance (Cap 159) explicitly provides that the Chief Justice is empowered to make rules to prescribe 'any other fee which is required to be prescribed under the Ordinance'. We have been advised that such fee can refer to fees payable for the issue of practising certificate in section 30(4) of the Ordinance. S72 is the proper empowering section instead of s30(4) which consistent with the empowering section by requiring the prior approval of the Chief Justice.

If you require any further information, please let me know.

Yours sincerely,

(Susie Ho)
for Judiciary Administrator

司法機構政務長辦公室的信頭
Letterhead of JUDICIARY ADMINISTRATOR'S OFFICE
香港司法機構
JUDICIARY HONG KONG

Fax.	國文傳真	2123 0028
Tel.	電 話	2123 0008
Your Ref.	來函檔號	
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14 December 1998

Mr Arthur Cheung
Assistant Legal Adviser
Legislative Council Secretariat
Legal Service Division
Legislative Council Building
8 Jackson Road, Central
Hong Kong
(by fax: 2877 5029)

Dear Mr Chueng,

Legal Practitioners (Fees) (Amendment) Rule 1998

Thank you for your letter of 11 December 1998. I have obtained further legal advice on the matter.

In respect of items (a) and (b), section 72 of the Legal Practitioners Ordinance quite clearly reflects the legislative intent that the Chief Justice should be empowered to make rules governing barristers, including the payment of fees for the issue of practising certificates. It is not appropriate to consider s30(4) should have any overriding effect over s72.

In respect of paragraph 10 of the Legislative Council Brief issued by the then Attorney General's Chambers in 1991, it appears that there was nothing mentioned therein which indicated that the Chief Justice had already given up the power to make rules in relation to the issue of practising certificate. All it was saying is that the Bar Association may issue its own certificates and retain the revenue.

Due to the clear wording of s72, we disagree that the power of the Chief Justice to make rules prescribing the fees of practising certificates has been displaced.

If you require any further information, please give me a call.

Yours sincerely,

(Susie Ho)
for Judiciary Administrator

c.c. Bar Association (Attn: Mrs Margaret Lam) (2869 0189)
Department of Justice (Attn: Miss Kitty Fung) (2869 0720)

LEGISLATIVE COUNCIL BRIEF

Legal Practitioners Ordinance
(Chapter 159)

LEGAL PRACTITIONERS (AMENDMENT) BILL 1991

INTRODUCTION

At the meeting of the Executive Council on 30 April 1991 the Council ADVISED and the Governor ORDERED that the Legal Practitioners (Amendment) Bill 1991, as annexed, should be introduced into the Legislative Council.

BACKGROUND AND ARGUMENT

Mandatory Continuing Legal Education

2. The Law Society has approved the introduction of a Mandatory Continuing Legal Education (MCLE) Scheme for implementation in 1991. The purpose of the MCLE Scheme is to improve the competence of articled clerks and solicitors through practically oriented, formal instruction. Articled clerks (trainee solicitors) and solicitors were consulted about the introduction of continuing legal education courses in Hong Kong. There was a consensus that there should be courses relating to substantive law and skills which complemented their activities in practice.

3. The Law Society decided to make the Scheme mandatory as a result of the success in other jurisdictions, i.e. England and Wales, New South Wales, and a majority of states in the United States of America, in implementing mandatory continuing legal education courses. At first, the Scheme will be mandatory for articled clerks and solicitors in their first year of practice, and will provide for the imposition of sanctions on those who have not completed the MCLE requirements. Sanctions could include refusing admission to an articled clerk, or not issuing a practising certificate to a solicitor. Eventually, programmes will be developed to meet the needs of more senior solicitors and support staff. The Law Society's long-term goal is to create an effective MCLE programme of wide appeal which will benefit solicitors and the public through the provision of better legal services.

4. The Ordinance does not empower the Law Society to require attendance at MCLE courses as a condition of articles or to impose the Scheme upon qualified solicitors. We support the concept of MCLE, which is now an accepted feature of professional practice in other places with similar legal systems.

Solicitors Admitted as Barristers

5. The Ordinance makes it difficult for some solicitors who have practised for a number of years in Hong Kong to be admitted to practise as a barrister. This restriction prevents legally qualified persons from changing their legal practice. By contrast, a barrister who has practised for a number of years in Hong Kong may be admitted as a solicitor.

6. The Ordinance also prevents a person who practises as a solicitor in a jurisdiction with a fused profession from being admitted to practise as a barrister in Hong Kong.

7. The Bar Association recommended the Ordinance be amended to allow solicitors admitted to practise in Hong Kong and who have practised in Hong Kong for a number of years to be admitted as a barrister. The Association also recommended the Ordinance be amended to allow solicitors who practise in jurisdictions with a fused profession to be admitted as barristers in Hong Kong. This would allow a greater number of persons from overseas to be admitted to the Bar; these persons would still have to qualify as a barrister under the Ordinance. This recommendation also permits barristers in Hong Kong to be admitted to practise in jurisdictions with a fused profession.

8. These amendments will permit a greater degree of flexibility for lawyers to change their practices, something we believe is helpful in the circumstances of Hong Kong where there is still a relatively small legal profession.

Issuance of Practising Certificates by the Bar Association

9. Before a solicitor or barrister may practise in Hong Kong he or she is required to hold a practising certificate which must be renewed each year. Certificates are issued for a fee and are subject to conditions of

practice. The Law Society issues practising certificates for solicitors who are paid-up members, and retains the revenue. Practising certificates for barristers are issued by the Registrar of the Supreme Court and the proceeds go to general revenue.

10. The Bar Association wishes similarly to issue its own certificates and retain the revenue. Practising certificates will only be issued to members of the Bar Association, which is similar to the restriction imposed by the Law Society. With control over the issuance of practising certificates the Bar will be seen to be independent and self-regulating.

11. There are currently about 430 barristers who must apply for a practising certificate each year; the cost of the certificate is \$120. The Registrar of the Supreme Court raised the matter with the Chief Justice who has no objections to the proposal. It removes this work from the Supreme Court.

THE BILL

12. Clauses 3, 4 and 10 of the Bill amend the Ordinance by permitting the Law Society to implement and supervise a MCLE Scheme and to issue conditional practising certificates to ensure compliance with the Scheme. (Clauses 3, 4 and 10)

13. Clause 5(a)(iii) permits a person admitted as a solicitor in Hong Kong and who has practised as a solicitor in Hong Kong for at least 3 years to be admitted as a barrister.

14. Clauses 5(b) and 7 remove the restriction upon a person who practises as a solicitor outside Hong Kong or the United Kingdom from being qualified and admitted as a barrister.

15. Clause 6 empowers the Bar Council to issue practising certificates, and make rules in relation to their issuance. Rules made by the Bar Council must have the prior approval of the Chief Justice, which is similar to the situation in respect of rules made by the Law Society Council.

16. The Bill makes minor amendments to the Ordinance by amending "articled clerk" to "trainee solicitor" and "Bar Committee" to "Bar Council".

PUBLIC CONSULTATION

17. There has been no public consultation. The Bar Association and the Law Society recommend and endorse the proposed amendments.

FINANCIAL AND STAFFING IMPLICATIONS

18. Because the Registrar, Supreme Court will no longer issue practising certificates, a very small amount of revenue (approximately \$50,000 per annum) will be foregone. The Bill has no staffing implications.

LEGISLATIVE TIMETABLE

19. Subject to Members' approval of the introduction of this Bill into the Legislative Council, the legislative timetable will be -

Publication in Gazette	10 May 1991
First Reading and commencement of Second Reading Debate	22 May 1991
Resumption of Second Reading Debate, Committee Stage, and Third Reading	to be notified

PUBLICITY

20. A press release will be issued to explain the amendments.

Attorney General's Chambers
8 May 1991