

**For decision
on 27 May 1999**

**LEGISLATIVE COUNCIL PANEL ON ADMINISTRATION OF
JUSTICE AND LEGAL SERVICES**

**PROPOSED AMENDMENTS TO THE LEGAL PRACTITIONERS
ORDINANCE**

(Chapter 159)

LEGAL PRACTITIONERS (AMENDMENT) BILL 1999

INTRODUCTION

The object of this paper is to seek from the Panel a preliminary view on the Administration's proposed amendments to the Legal Practitioners Ordinance (Cap. 159) (the Ordinance). The purpose of the proposed amendments is to improve certain aspects of the law governing solicitors and barristers which are unsatisfactory.

BACKGROUND AND ARGUMENT

General Background

Solicitors

(a) Practitioners of foreign law to take out professional indemnity insurance

2. Under current legislation, solicitors practising under a conditional practising certificate are not entitled to practise as a solicitor on their own account or in partnership, and are therefore not required to take out professional

indemnity insurance. It is the policy intent that all those who act as solicitors or foreign lawyers should be required to take out professional indemnity insurance. This is to ensure that aggrieved clients of solicitors who may not be able to compensate their clients will still be adequately compensated.

3. At present, a person who offers his services to the public as a practitioner of foreign law commits an offence unless he is a solicitor, barrister or foreign lawyer. The relevant section of the Ordinance gives rise to a situation whereby a solicitor holding a conditional practising certificate (but who need not be registered as a foreign lawyer) is allowed to practise foreign law. The effect is that he can do so without taking out professional indemnity insurance. This is against the policy intent and is not in the public interest.

(b) Prosecutor's Investigative Powers

4. Under current legislation, the Solicitors Disciplinary Tribunal (SDT) is empowered to enforce 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.

5. In the case of a suspected disciplinary offence involving a third party, the information or assistance provided by such third party at the investigative stage may be useful in assisting the Law Society in determining whether or not a particular offence has been committed. Although it is unusual to provide for a sanctionless power to summon people to give evidence, it is in the public interest that investigation of the conduct of legal practitioners be facilitated as much as possible.

(c) Right of Appeal by the Law Society in respect of findings of SDT

6. Currently, the Law Society 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. If the Law Society is given a right of appeal against the finding of the SDT, the Law Society will have a clear power to better protect the public and to restore the public's confidence in the disciplinary proceedings which may be undermined by erroneous decisions of the SDT.

(d) Publishing resumes or findings of the SDT

7. It is the current practice of the Law Society to publish resumes or findings and orders of the SDT in its official magazine. It is desirable that this practice be expressly provided for in the Ordinance.

(e) Publishing of “Hong Kong firm” in section 2 of the Ordinance

8. The definition of “Hong Kong firm” in the Ordinance is open to the interpretation that only those 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.

9. The Law Society is concerned that if this interpretation is available, it will be arguable that non-resident partners will not have to be qualified lawyers and therefore will not come under the regulatory control of the Law Society or possibly any other professional body. This is neither the intention of the Law Society nor the intention of the Administration.

(f) Numbers of solicitors and lay persons available for the Solicitors Disciplinary Tribunal Panel

10. It is provided in the Ordinance that 60 practising solicitors and 30 lay persons be available for the Solicitors Disciplinary Tribunal Panel (SDT Panel). Due to expansion of the Law Society’s membership and the increasing workload of the SDT Panel members, it is desirable that the SDT Panel should 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. It is proposed that the numbers be increased to 120 and 60 respectively

Barristers**(a) Admission Criteria**

11. Under current legislation, there is no recourse for foreign lawyers coming from non-Commonwealth jurisdictions to gain admission in Hong Kong. This is inconsistent with the general obligations of the GATS which require such criteria to be objective, reasonable, non-discriminatory and standards-based.

12. In 1995, the then Attorney General's Chambers published a Consultation Paper on Legal Services ("Consultation Paper") to solicit views from the profession and the general public concerning the legal profession. One of the issues explored was the application of the GATS to Hong Kong. It was recommended by the Administration that legislation should be prepared to amend the criteria for admission as a barrister so that they are objective, reasonable, non-discriminatory and standards-based. In the Report on the Consultation Exercise and Proposals for the Way Forward ("the Report") published by the then Attorney General's Chambers in 1996, it was proposed that the Administration introduce legislation to implement this recommendation.

13. The Administration also considered that the Court should retain a flexible approach in dealing with admitting a person as a barrister for the purpose of any particular case (so-called "ad hoc admissions"). 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.

(b) Power of the Bar Council to make subsidiary legislation

14. Unlike the case of the Law Society in respect of solicitors, the Bar Council does not have the power to make subsidiary legislation governing the admission of barristers, conduct of barristers and other general matters relating to barristers. The Bar Association proposed that the Bar Council should be empowered to make subsidiary legislation governing barristers. The Administration supported this proposal provided that the making of such subsidiary legislation is subject to the approval of the Chief Justice.

(c) Employed barristers

15. In the Consultation Paper, the Administration recommended that employed barristers should, as a general rule, be entitled to instruct practising barristers directly. In the Report it was noted by the Administration that the Bar Association supported this recommendation.

(d) Mechanism for removal and restoration of names of barristers in the

roll

16. At present, the removal and restoration of names of barristers in the roll of barristers are by way of notice of motion. It is proposed by the Bar Association that a mechanism should be in place in the Ordinance for this purpose. The Administration supports this proposal.

(e) Application for practising certificates in November

17. Under current legislation, barristers are required to apply for practising certificates in November each year. It is argued by the Bar Association that this arrangement is administratively unworkable and unduly restrictive and they propose that the requirement that applications may only be made in November be removed. The Administration supports this proposal.

(f) Requirement for indemnity insurance

18. Under current legislation, there is no requirement for barristers to pay for indemnity insurance premium before being issued a practising certificate. Such requirement for the payment of compulsory insurance premium is only a condition found in the Code of Conduct of barristers.

DETAILED RECOMMENDATIONS

Principal amendments

Solicitors

(a) Practitioners of foreign law to take out professional indemnity insurance

19. It is proposed that amendments be made to the Ordinance so that solicitors who provide services to the public as practitioners of foreign law must comply with section 7 of the Ordinance which sets out the qualifications required to “act as a solicitor”. These qualifications include having current practising certificates and compliance with the Solicitors (Professional Indemnity) Rules, or being exempted from compliance with those Rules by the Law Society Council.

(b) Prosecutor's Investigative Powers

20. It is proposed to amend the Ordinance to give prosecutors of the Law Society a right to summon persons who are or were members or employees of law firms or who may be able to assist in a suspected disciplinary offence to give evidence to the Law Society at the pre-disciplinary proceedings stage. It is also proposed that the prosecutors be empowered to summon and to make enquiry. However, no sanction is proposed for failure to comply with the summons.

21. By empowering prosecutors to summon persons for questioning, it would assist the Law Society in deciding whether a complaint is more likely to be genuine or the result of a breakdown in communication. The Law Society can save time and costs without going through a full disciplinary proceedings and the complainant will hopefully be provided with a response within a shorter time. It is believed that a summoned person will in many cases be more willing to assist and provide information to the Law Society than if a prosecutor simply requests to see him. In the event that a SDT has to be convened, the Law Society can compel the persons to attend or answer questions put to him under section 11 of the Ordinance.

22. Although it is unusual to provide for a sanctionless power to summon people to give evidence, it is in the public interest that investigation of the conduct of legal practitioners be facilitated as much as possible.

(c) Right of Appeal by the Law Society in respect of findings of SDT

23. It is proposed to amend the Ordinance to give the Law Society a right of appeal against a finding of the SDT.

(d) Publishing resumes or findings of the SDT

24. It is proposed to amend the Ordinance to enable the Law Society to publish resumes or findings and orders of the SDT. It is proposed that a concise version of all findings and orders of proceedings before a SDT will be published and that the name of the solicitor will be published if he is 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. It is proposed that the respondent will be entitled to seek an order from the SDT that the acquittal will not be so published.

(e) Publishing of “Hong Kong firm” in section 2 of the Ordinance

25. It is proposed to amend the Ordinance to clarify the definition of “Hong Kong firm” for the better protection of the legal profession and the public.

(f) Numbers of solicitors and lay persons available for the Solicitors Disciplinary Tribunal Panel

26. It is proposed that the numbers of available solicitors and lay persons for the SDT Panel be doubled, namely from 60 to 120 and 30 to 60 respectively.

Barristers

(a) Admission Criteria

27. It is proposed that the Ordinance be amended by removing the present privileges conferred on barristers or advocates from England, Scotland, Northern Ireland and other Commonwealth countries. 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. Further, it is proposed that a residency requirement for admission be imposed.

28. In order to allow the Court to retain a flexible approach in dealing with ad hoc admissions, it is proposed that the relevant provision of the Ordinance be amended to allow the Court to retain the power to admit barristers on an ad hoc basis without the need to satisfy the requirements for general admission, such as examinations and residency. It is argued by the Bar Association that it should be provided in the legislation that only barristers of ten years experience could be qualified to be admitted on an ad hoc basis. The Administration’s view is that in order for the Court to retain a flexible approach in dealing with ad hoc admission, the provisions should not be unnecessarily

restrictive. Given that there is no restriction on the number of years of experience of ad hoc admittees under existing provision of the Ordinance, it has nonetheless been the practice of the Court to admit, on an ad hoc basis, overseas Queen's Counsel who are necessarily barristers having more than ten years of experience.

(b) Power of the Bar Council to make subsidiary legislation

29. It is proposed that the Bar Council be empowered, subject to the prior approval of the Chief Justice, to make rules governing the admission of barristers and in certain prescribed areas concerning barristers, such as professional practice, the conduct and discipline of barristers, the issue of practising certificates, the conduct of inquiries and investigation by the Barristers Disciplinary Tribunal, and the examinations to be taken for admission and service of pupillage.

(c) Employed barristers

30. It is proposed that a new category of "employed barrister" be created. A barrister in this category will be issued with an "employed barrister's certificate" and will be allowed to instruct a practising barrister on behalf of his or her employer without the intermediary of a solicitor.

(d) Mechanism for removal and restoration of names of barristers in the roll

31. It is proposed that the Ordinance will provide a mechanism for the removal and restoration of names of barristers in the roll of barristers.

(e) Application for practising certificates in November

32. It is proposed that amendments be made to remove the requirement for application for practising certificates to be made in November of each year.

(f) Requirement for indemnity insurance

33. It is proposed that the Ordinance makes it clear that payment of indemnity insurance premium is a prerequisite for the issue of a practising

certificate.

PUBLIC CONSULTATION

34. The Law Society and the Bar Association have been consulted on the proposals. The Law Society has raised concern about the creation of a new category of barristers, namely, employed barristers. The Law Society considers that barristers who have never undergone a period of trainee contract as required of trainee solicitors should not be allowed to act in-house in a role identical to solicitors without formal training and supervision.

35. In the Administration's view, the recommendation in respect of employed barristers was fully explored in the Consultation Paper in 1995. According to the Report in 1996, both the Bar Association and the Law Society supported the recommendation. It was also proposed in the Report that the Administration would monitor the implementation of this recommendation.

36. The Bar Association objected to the residency requirement of 3 months prior to admission since it is considered that this period is too short. Instead, it is considered that a residency requirement of 6 months should be imposed.

37. The Administration considers that a 3 months' residency requirement is appropriate since the same period of residency is imposed by the Law Society in the case of solicitors and there is no reasonable justification for the difference between the two branches of the profession in this respect.

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