

香港大律師公會的信頭
Letterhead of HONG KONG BAR ASSOCIATION

26th May, 1999

Your Ref: LP5004/4/12C

Department of Justice,
Legal Policy Division,
4/F High Block,
Queensway Government Offices,
66 Queensway,
Hong Kong.

URGENT

Attn: Ms. Kitty Fung

Dear Ms. Fung,

Re: Legal Practitioners (Amendment) Bill 1999

I refer to your letter dated 10th May, 1999 enclosing a draft Bill (2nd draft: 7th May, 1999) for the comments of the Bar Association and your letter dated 18th May, 1999 setting out your response to our comments in our letter dated 13th May, 1999.

I set out below the comments of the Bar on the 4th draft of the Bill dated 21st May, 1999, which was faxed to the Bar Association on 25th May, 1999. In view of the meeting of the LegCo Panel on 27th May, 1999, I have copied this letter to the Clerk to the AJLS Panel for distribution to the members on the Panel. References to various "clauses" herein are to the provisions in the 4th draft of the Bill. References to various "sections" are to the existing provisions in the Legal Practitioners Ordinance, Cap. 159 and the proposed amendment thereto under the Bill.

Clause 7: Power of Court to admit barristers

Section 27(2)(b)(i)

The residency requirement of "3 consecutive months" immediately before admission is unlikely to be workable in the case of barristers.

We note that the reason why the Department of Justice has suggested 3 months is because this is the period of residency requirement imposed for solicitors. We do not think the same requirement should apply to applicants to the Bar in view of the following differences between barristers and solicitors:

- (1) While trainee solicitors from overseas will have had some chance to become familiar with the local conditions during 2 years of training, applicants to the Bar will only have a year of pupillage to become so familiar before starting full practice. In some cases, pupillage may even be less than 12 months if the applicants successfully seek a reduction of pupillage on account of substantial experience in advocacy in Court.
- (2) We envisage no difficulty for most applicants to satisfy the requirement of 6 months residency as it is the proposal of the Bar Council to provide in subsidiary legislation that a person will not be called to the Bar until he has completed 6 months' pupillage and is in a position to apply for a limited practising certificate under section 31(2).

For these reasons, we have set out this proposed amendment to the subsidiary legislation in our proposals to the Department of Justice on 15th April, 1998 ("Proposals") at page 4§ 2(6) and page 15§ 25. It does not appear that our concerns have been properly addressed in the current bill.

Section 27(4)

The Bar is strongly of the view that in the provision dealing with ad hoc admissions, there should be a requirement that the applicant must have *actual* advocacy experience of at least 10 years to qualify for the Court to exercise its discretion in his favour. We do not think this would render the Court's power unduly restrictive.

On the proposed wording of section 27(4) in the Bill, all that is required is for the applicant to have the "qualification" to engage in work that would, if undertaken in Hong Kong, be similar to that undertaken by a barrister in the course of a regular practice in the High Court or the Court of Final Appeal. It is not a requirement that the applicant should have actual experience in such work. Any barrister that has been called to the English Bar would have acquired the "qualification" as envisaged in your proposed section 27(4). The anomaly is even greater when one considers the proposed requirement of the Bar Council regarding those who seek admission as a barrister in Hong Kong generally on the basis of their overseas qualification. In our Proposals, we have proposed to provide in subsidiary legislation that such applicants should have practised for at least 3 years in the overseas jurisdiction in which they have qualified. We wonder if these anomalies were intended.

Amendments consequential to amendment of section 27

Clauses 8, 11, 14 and 16 of the Bill are described in the Explanatory Memorandum as "consequential amendment" resulting from amendments to section 27. These seem to be the only consequential amendments in view of the amendment to the requirement for admission in section 27.

It is, however, an important consideration in our Proposals that in removing the right of U.K. barristers to be admitted in Hong Kong on the basis of their U.K. status, the new requirements for admission should apply to all those who seek admission on the basis of qualifications acquired outside Hong Kong. It is part of our Proposals that the additional power of the Court under section 27A to admit barristers listed in various Commonwealth countries in Schedule 1 to Cap. 159 and who have been employed in the Department of Justice

for 7 years should be abolished (see page 5, § 2(7) of our Proposals). We see no valid reason why section 27A should be retained.

Transitional provision

We note that no transitional provisions have been provided for in the Bill. We are concerned by the lack of such transitional provisions since any legislative changes should not affect the rights of those who seek admission to the Bar on the basis of their U.K. qualifications before the new admission requirements are to take effect (see page 5, § 2(8) of our Proposals).

It is part of our Proposals that the specific conditions for admission of applicants on the basis of qualifications acquired overseas should be provided for in subsidiary legislation (pages 2 to 5, § 2(1) to (5) of our Proposals). Under Clause 1(2) of the Bill, Clause 15 which gives the Bar Council the power to make rules in this respect with the prior approval of the Chief Justice, is probably not to come into operation at the same time as all the other provisions in the Bill. Without a suitable transitional provision, the situation may arise when the existing route for admission by virtue of U.K. qualifications is abolished and the new mechanism for admission by virtue of overseas qualifications through examinations to be prescribed is not put in place by subsidiary legislation.

Clause 9: Roll of Barristers

Section 29

Only parts of the amendments we have proposed in respect of section 29 have been included in the Bill. We note your explanation in your letter dated 18th May, 1999 that only “priority issues” are included in the Bill and you intend to deal with “remaining issues” at a later stage after further consideration.

Of the amendments we have proposed to section 29 and which you have not included is this provision:

“Any person admitted under section 27 and whose name appears on either of the rolls of barristers referred to in section 29(1) shall be subject to the rules and practices set out in the Code of Conduct for the Bar of Hong Kong in force from time to time.”

As we have explained in our Proposals (page 9, § 11) and our letter to you dated 13th May, 1999, the purpose of this amendment is to make clear that all barristers admitted in Hong Kong, including those admitted on an ad hoc basis from other jurisdictions, are subject to the Code of Conduct for barristers in Hong Kong. This will preclude argument that an advocate admitted ad hoc may conduct himself in Hong Kong in ways which, although unacceptable under Hong Kong’s Code, are alleged to be unobjectionable in the advocate’s home jurisdiction. This amendment seems to us necessary to regulate the quality of the foreign barrister’s service in Hong Kong and thus highly desirable and uncontroversial and we see no reason why this amendment should not be introduced now instead of later.

Clause 10: Practising Certificates - Barristers

Section 30(1)

We suggest that the practising certificates issued to practising barristers under this section should be called “practising barrister’s certificate” as per our Proposals, to distinguish this clearly from another kind of certificate issued to employed barristers dealt with in clause 11.

In our Proposals (pages 11 to 12, § 16(2)), we have suggested that it should be made a requirement for the issue of a practising certificate that an applicant is to “complete such forms as the Bar Council may prescribe”. This requirement has not been incorporated in the amendment to section 30(1). As we have explained in our Proposals, the application form to be prescribed will require an applicant to declare that he intends to practise in Hong Kong as a barrister in a forthcoming year. The intention is to curb any possible abuse by persons obtain practising certificates with no intention to practise at all and hold themselves out as practising barristers.

Section 30(3)(a)

In the Bill, a barrister admitted ad hoc under section 27(4) is to be exempted from the membership subscription of the Bar Association. This is contrary to our Proposals (page 12, § 18). We see no reason for this exemption because the Bar Association treats overseas advocates admitted ad hoc in the same way as it treats domestic members. We render the same assistance to overseas advocates, whilst admitted to the local Bar, as to domestic members in the event of any difficulty or dispute with their solicitors. In particular, we cannot exercise any disciplinary power over a barrister who is not a member to the Bar Association. The proposed exemption will make it impossible to police abuses or ethical breaches by foreign barristers.

Section 30(3)

We suggest adding a sub-paragraph (c) as follows:

“Such other fee or fees as the Bar Council may from time to time prescribed.”

This is part of our Proposals but has been omitted from section 30(3) in the Bill. As presently worded in the Bill, it may be doubtful whether the Bar Council may withhold issuing a practising certificate to a barrister who has not paid the fee for a practising certificate.

Clause 11: Qualifications for practising as a barrister

In our Proposals, we have suggested amendments to section 31, none of these provisions have been included in the draft Bill. We do not think these draft amendments could be dealt with completely by way of subsidiary legislation under the new section 72AA(g) as you have suggested in your letter dated 18th May, 1999. The proposed amendments we have suggested to section 31 are different in some respects with the principal legislation and any changes thereto must be effected by way of amendment of the principal legislation.

Our suggested amendments to section 31 (page 14 of our Proposals) are set out again for your ease of reference:

- “s.31. (1) A barrister shall not be qualified to practise as such:-
- (a) subject to subsection (3), unless he has completed the prescribed qualifying period of active practice; and,
 - (b) unless he undertakes to hold himself as willing to appear in a court on behalf of any client or to give legal advice or services to any client.
- (2) In addition to the restrictions in sub-section (1), a barrister shall not be qualified to practise as such:-
- (a) if he is an employed barrister; or,
 - (b) if he is suspended from practice under section 37; or,
 - (c) if he is on the roll of solicitors.
- (3) After the expiry of such number of months, not being less than 6 months, of the prescribed qualifying period of active practice as the Bar Council may from time to time determine in its absolute discretion, a barrister shall be qualified to practice as a barrister to such limited extent as the Bar Council may determine.”

Clause 12: Section added

Section 31C(4)

In your letter dated 18th May, 1999, you have stated that the Law Society has requested clarification as to what functions an employed barrister will be able to perform because of their concern that employed barristers “will be in a position to act in-house in a role identical to solicitors without formal training or supervision”. Our comments are as follows:

- (1) You would see from section 31C(2) that a person may only apply for an employed barrister’s certificate if he has fulfilled one of the three requirements. A person who has fulfilled one of those requirements is not a person without “formal training or supervision”. These requirements are also similar to the provisions governing employed barristers in the Code of Conduct of the Bar of England and Wales (paragraph 402.2).
- (2) The only additional legal service that an employed barrister is permitted to provide to his employer without retaining a solicitor under section 31C(4) is to instruct a practising barrister in any contentious or non-contentious matter.

Clause 14: Rules for barristers in Hong Kong

We are of the view that the entire section 72A should be repealed as most of the matters covered in section 72A have now been dealt with in section 72AA(c), (g) and (h).

Regarding the provision in section 72A(bb) for “prescribing the qualifying period of active practice for the purposes of section 31”, we suggest provision should be made for this under section 72AA instead.

Clause 15: Section added

Section 72AA(b)

We confirm that this is acceptable to the Bar Association.

Section 72AA(c)

We suggest “practising certificates to barristers” be altered to read “practising barrister’s certificates”.

Section 72AA(d)

We suggest the words “and pupils” be added after “barristers” to make it clear that continuing legal education or training is to be undertaken by pupils as well as barristers.

Section 72AA(e)

This would appear to cover the same matter as in section 72(b)(ii), which comes under the power of the Chief Justice to make rules. We think section 72(b)(ii) should be repealed to avoid any conflict with this.

Section 72AA(f)

This refers to “an order of misconduct ... made by the Bar Council”. We are puzzled by this and would be obliged if you could refer us to the relevant statutory provision dealing with this.

Section 72AA(g)

This should read: “regulating the serving of pupillage ...”. Again, this provision seems to cover the same matter as some of the provisions under section 72A as stated above. We think the latter provisions should be repealed.

Section 72AA(h)

We suggest the words “overseas barristers” be removed and this provision is to be altered to read: “respecting the admission of persons on the basis of qualifications acquired outside Hong Kong including ...”

I refer to your letter dated 21st May, 1999 in which you enclose a 3rd draft of the Bill in Chinese for the Bar’s comment. We are considering the Chinese draft at the moment. As for your request that we confirm whether the Chinese equivalents of “employed barrister’s certificate” and “order of misconduct” are in order, I confirm that the proposed English

expressions are in order. For the “order of misconduct” in section 72AA(f), please see the comments in the earlier part of this letter.

Yours sincerely,

Ronny Tong, SC
Chairman